IN THE

Supreme Court of the United States

October Term, 1945

No. 58

JOACHIM O. FERNANDEZ, United States Collector of Internal Revenue,

Appellant,

v.

SAMUEL G. WIENER; WILLIAM B. WIENER and JACQUES L. WIENER,

Appellees.

No. 59

THE UNITED STATES OF AMERICA,

Appellant,

v.

HENRY ROMPEL, JR., as Administrator de Bonis Non Cum Testamento Annexo of Ernst Herbst, Deceased,

Appellee.

On Appeal in No. 58 From the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

On Appeal in No. 59 From the District Court of the United States for the Western District of Texas, San Antonio Division.

BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, ARIZONA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS AND WASHINGTON, AS AMICI CURIAE.

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BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, ARIZONA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS AND WASHINGTON, AS AMICI CURIAE.

The Attorneys General of the States of California, Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas

and Washington, pursuant to leave of Court, file this brief as *amici curiae* in support of the decisions here under review.[1] In so doing they are acting on behalf of the people of their respective communities, to whose interests and social polity the present causes are of vital, and extraordinary, concern.

The Question Presented

Omitting formal matters sufficiently covered in other briefs on file, we come at once to the problem of the validity of the 1942 amendment to Section 811(e) of the Internal Revenue Code (56 Stat. 941), by which there is included within a decedent's taxable estate, property

> "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Carrying forward the same concept, the 1942 Act added corresponding provisions relative to life insurance purchased with community funds (Section 811(g)(4), I.R.C., 56 Stat. 941); and to "gifts of property held as community" (Section 1000(d), I.R.C., 56 Stat. 952).

The position of the people of the community property states is briefly indicated by the following

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[1] *Rompel v. United States*, 59 F. Supp. 483; *Wiener v. Fernandez*, 60 F. Supp. 169.

Summary of Argument.

I. Congress, in ascribing a fictional status to the wife's interest in community property, has given legislative sanction to an unrealistic and unhistorical view of the community property system. (See pages 4 to 17.)

II. The 1942 Act deprives married women residing in the community property states of property without due process of law, by including their property, namely, their community interest, with the property of their husbands for the purpose of levying death duties against the estates of the latter. As to such property, there is no transfer from the husband to the wife, nor any accession to the wife's rights and interests by reason of the husband's death, sufficient to constitute a taxable event. (See pages 18 to 31.)

III. The 1942 Act does not operate with geographical uniformity. In community states, it taxes at the husband's death the transfer of property as to which the wife stands substantially in the relationship of a co-owner or partner with her husband, imposing no tax on the transfer of property held under comparable relationships in non-community states. In the community property states, this results in unjustly augmenting husbands' estates, and in thereby increasing the rates applicable to property rightfully included. (See pages 31 to 36.)

IV. Community property, an incident of the marital relation, originates in and is regulated by state law. The nature and quantum of the spouses' interests, determinable by that law only, cannot be ignored by Congress for the purpose of levying taxes. Rights created and protected by state law are set at naught if Congress is permitted to go back to the assumed "source" of marital property, to give or take away according to its own con-

cepts of economic origin. Such legislation is an invasion of the powers reserved to the states or to the people. (See pages 37 to 46.)

V. The community property system, dealing with a subject matter peculiarly of local concern, represents an expression of state policy, social and economic. This fact gives special emphasis and urgency to the contention of the communiy property states based upon the Tenth Amendment. Determinable by no rule of thumb, the problem presented involves considerations having to do with social advantage or disadvantage, with the enhancement or deterioration of the human values of the communities concerned.[2] We have considered it appropriate therefore to point out certain respects in which the Court's decision may aid or impede progress toward desirable social objectives. (See pages 46 to 74.)

I.

The Congressional Concept of Community Property.

We submit that in enacting the 1942 amendments Congress was acting under a fundamental misconception as to the nature of, and the respective rights of spouses in, community property—a misconception reflected in the reports of the Congressional committees which framed and sponsored this legislation.

The Report of the House Ways and Means Committee on the 1942 Act says (in part):[3]

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[2]See quotations from Justices Holmes and Frankfurter, pages 47 and 70, *infra*.

[3]On legislative history as an aid to construction, see *Harrison v. Northern Trust Co.*, 317 U.S. 576, 87 L. ed. 407 (1943); *Riggs v. Del Drago*, 317 U.S. 95, 98, 99, 87 L. ed. 106 (1942); *Helvering v. Griffith*, 318 U.S. 371, 378, *et seq.*, 87 L. ed. 843 (1943).

> "For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in noncommunity-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In noncommunity-property States, all such property is regarded as belonging entirely to the husband." (1942-2 C.B. 401.)

After illustrating the results of this alleged "preferential treatment," the Report continues (1942-2 C.B. 402):

> "Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. * * *"

The Report of the Senate Finance Committee (1942-2 C.B. 674) says the amendments "make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor." (Emphasis supplied.)

The House Committee states that in community property states, property acquired by the husband's efforts after marriage "is treated *as if* one-half belonged to the wife." The *as if* assumes that the wife's ownership is a fiction. The Senate Report, more considerate in form, carries the same implication. To whom, says the Senate, is the property "economically attributable"? The state law, through whose grace and under whose protection the property was acquired, deems it attributable to *both*

spouses. But the Senate Committee attributes the property to one spouse, presumably the husband.[4]

The Acting Secretary of the Treasury in a letter to the Senate (Sen. Doc. 69, 78th Cong., 1st Session, June 23, 1942), refers to the community property system as a "loophole for taxation." A distinguished lawyer, formerly General Counsel of the Treasury, speaks of it as an "alien intruder" (Paul, *Federal Estate and Gift Taxation*, Section 1.09). The writer of an annotation to *Rompel v. United States*, 59 F. Supp. 483, in 58 Harvard Law Review 742, says, "* * * in substance the wife's interest in property held in a community property regime differs little from her interest in her husband's property at common law." This assumption, if correct, would require or at least justify, putting the wife's interest on the same basis as dower, or any other merely "expectant" interest.[5]

Views such as these, widely diffused, have had their influence on Congress. Although, as we believe, fundamentally erroneous, they have gained such acceptance as presently to imperil the domestic economy of the community property states. Of the grave constitutional prob-

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[4]The Treasury, a non-legislative agency, but one which is influential in these matters, holds community property in even less esteem than does Congress, regarding not merely the wife's ownership, but the entire community system as a fiction. In Section 472.405 of Treasury Decision 5279, 1943 C.B. 952, 970 (July 10, 1943), the Treasury, referring to the postponement of certain acts where a member of the armed forces is concerned, speaks of a case where "the spouse and member are domiciled in a *so-called* community property state." (Emphasis ours.)

[5]The Government, admitting there are "technical differences" between the two kinds of interests, contends that they "afford no ground for distinctions upon the constitutional level" (App. Br., *Wiener* case, page 41, also page 6). We hope to show that the differences are more than "technical" — whatever that convenient term, here used in a denigratory sense, may include.

lems to which the 1942 legislation gives rise, one has to do with the power of Congress to ignore property rights recognized and enforced by state law. This will be discussed later. At the moment, we are concerned with an assumption underlying the attitude of Congress, explaining to some extent, we believe, the expression of its will, namely, that to endow the wife with part ownership of property acquired through the sharing of burdens and sacrifices is to give substance to a fiction; that the very concept of equal ownership is alien, having no place in American institutions.

We shall undertake to show that systems of community property are ancient and widespread; and that the contrary concept, that the wife's interest in community property is a delusion, hardly more than a pretense, is based upon a misconception of the nature of community property, its history, and the social policy which it exemplifies.

Origin of the Community Property System in America.

The community property system was old at the birth of the American Congress, which a century and a half later was to deny that the system had any substantial reality. Without disputing claims to a more ancient lineage, suffice it to say that the origins of the system can be traced at least as far back as the early Christian era.[6] It is the true heritage of the Anglo-Saxon peoples, lost to them through historical accident, as we shall show in another place (see page 62, *infra*).

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[6]Some resemblances to, perhaps the beginnings of a community property system, are found in very ancient times. See Lobingier, The History of the Conjugal Partnership, 63 Am. L.R. 250 (1929); Howe, The Community of Acquests and Gains, 12 Yale L.J. 216 (1903); de Funiak, Principles of Community Property, Section 7.

Germany. The Teutonic tribes recognized a form of marital community ownership as early as the period of the folk laws, or *leges barbarorum,* which antedated the Frankish period, beginning about 500 A.D. (See quotations from Huebner, *A History of Germanic Private Law,* Appendix, pages 1 to 5.) During the period of the Frankish Empire (about 500 to 843), the community principle was further developed into what Huebner terms (Appendix, page 1), "a true legal community as respects so-called *acquests* '(Errungenschaften'),—that is, such property as was acquired by the spouses during marriage, by labor or by juristic act, for value." That the community system continued in full vigor through mediaeval and modern times—except perhaps the most recent, when German civilization, formerly respected and renowned, has gone into eclipse—is shown by the excerpts from Huebner, quoted Appendix, pages 3 to 5.

France. The origins of the community system in France are uncertain, but that a form of community existed there in the mediaeval period is clear. Beaumanoir, *célèbre légiste* of the latter half of the 13th Century (1246-1296), is quoted in Brissaud, *A History of French Private Law,* page 816 (see Appendix, p. 8), as follows. "Everyone knows that a community is formed by marriage, for as soon as the marriage is performed the property of one and the other becomes common by virtue of the marriage. My views are that the man is a guardian . . ."[1]

[1]Referring to the same period, the French scholar Gaëtan Aubéry says: "The marital authority has then for foundation, in the time of Beaumanoir, the desire to introduce concord and stability to the fireside by establishing a single control. The wife is not at all an inferior, but an associate who is subordinate to the husband only in that he is head of the firm." (Aubéry, *La Communauté de Biens Conjugale* (Paris, 1911), page 180; our translation; for the original, see Appendix, page 9.)

Without prolonging the discussion, we respectfully refer the Court to various excerpts from Brissaud, quoted Appendix, pages 5 to 9. Normandy, dominated by "nobles," refused to accept the community system (Brissaud, page 790). We shall later (see page 58, *infra*) explain the reasons for this, and how it came to pass that the people of England and the United States were deprived of this heritage of their ancestors. Normandy aside, the community system spread from the countries or regions of the *Coutumes* to the whole of France.

As further showing how ancient and widespread was the community concept in France, we quote in the Appendix, page 15, excerpts from de Ferriere, *Nouveau Commentaire Sur La Coutume de Paris* (Paris, 1770), from which it appears that a highly developed system of community property was in effect under the renowned civilization of the French capital, long prior to the American Revolution. It is not without relevance to the instant cases to observe that in England, at the same time (see Blackstone, Appendix p. 18; also Note 10, *infra*), the wife's existence was "suspended," or "entirely merged or incorporated" in that of the husband, who, to "acquire" property in absolute ownership had only to marry its owner; at a time, moreover, when the husband not only appropriated the wife's goods, but could give her "moderate correction" (Appendix p. 18); a privilege which, he says, the "lower rank" of people, "always fond of the old common law,"—singular people, indeed—still claimed and exerted. After enumerating various indignities and outrages to which women were subject at common law, the humorous Blackstone concludes: "so great a favourite is the female sex of the laws of England." (See Appendix p. 19.)

A passage from Molière (1622-1673), written more than one hundred years before the American Revolution, shows how familiar the community idea was at that time even to a popular audience in Paris. A "notary" is speaking:

> "Don't I know that being joined, people are, by custom,
>
> Common in movables, in immovables and goods acquired,
>
> Unless by a writing expressly renounced?" (L'Ecole des Femmes, Act IV, scene 2; our translation; for the original, see Appendix p. 10.)

Spain. The Visigoths, who invaded Spain about 412 A.D., brought with them a community property system whose outlines have been preserved in the *Forum Judicium,* commonly known as the Visigothic Code, compiled about the middle of the 7th Century (see Scott, *The Visigothic Code,* Boston, 1910, preface, page 24; also Schmidt, *Historical Outline,* page 28, referred to Note 8, below), the Spanish text being known as *Fuero Juzgo.* According to Book 4, Title 2, Law 17, of this compilation (Law 16 of Scott's translation of the Latin version; see Scott, *The Visigothic Code,* page 126), husband and wife shared originally in the community according to a proportion fixed by their respective contributions. Their shares later, but prior to the middle of the 13th century, became equal (*Fuero Real,* Book 3, Title 3, Law 1, *Los Codigos Españoles,* page 378 (Madrid, 1847),[8] and

[8]The *Fuero Real,* promulgated in 1255, was a precursor of the compilation known as *Las Siete Partidas* (translated by Scott under that title, Chicago, 1931), first published in 1263. See Schmidt, *Historical Outline of the Laws of Spain,* page 67, the latter work being an introduction to *The Civil Law of Spain and Mexico* (New Orleans, 1851), by the same author.

this system, persisting to modern times (*Novisima Recopilacion,* Book 10, Title 4, Law 1 (Madrid, 1805)), was carried into the Spanish Civil Code (Art. 1392 *et seq.;* see *Codigo Civil* (Barcelona, 1934); Felipe Sanchez Roman, *Derecho Civil,* Volume 5, page 826 (Madrid, 1912)).

England. In England, the community idea made no headway against the common law concept, early developed, that husband and wife are one and that one the husband;[9] or as Brissaud puts it, "the feme covert * * * was absorbed in and annihilated by her husband" (*op. cit.* p. 29; Appendix p. 6).[10] "The community was more frequent originally among the commoners" (Brissaud p. 821; Appendix p. 8). "The social anatomy of this law" (that of the nobility) is "more archaic than that of the plebeians" (Brissaud p. 822; Appendix p. 8).

These observations of the French legal historian are confirmed by eminent English authority. The distinguished scholars Pollock and Maitland say:

> "We are told that in France the system of community first became definite in the lower strata of society; there was community of goods between the *roturier* [commoner] and his wife while as yet there was none among the gentry. We have often had occasion to remark that here in England the law for the great becomes the law for all. * * *. In

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[9]Holmes, J., dissenting in *Hoeper v. Tax Commission,* 284 U.S. 206, 219, 76 L. ed. 248 (1931).

[10]Blackstone confirms this, also stating that "a sixth method of acquiring property in goods and chattels is by *marriage.*" See in the Appendix, page 18, quotation from Blackstone's Commentaries, page 433, Book II (Cooley's 2nd ed., Chicago, 1872).

See also Holdsworth, A History of English Law (6th ed., Rev.), Volume 3, page 526, on the point that there were no limitations on the husband's rights over the wife's chattels, and that the latter became absolutely the property of her husband.

> England, with its centralized justice, the habits of the great folk are more important than the habits of the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property, and this was first evolved among the rich by means of marriage settlements." (Pollock and Maitland, *History of English Law*, 2d Ed., Vol. 2, page 402. See also Appendix p. 19.)

Holdsworth, in Volume 3, page 524, *op. cit.* Note 10, *supra*, says:

> "In the course of the thirteenth century the law took a turn which resulted in the rejection of any theory of community. This was due to two causes. (1) We have seen that the royal courts, and therefore the common law, surrendered to the ecclesiastical courts all jurisdiction over testamentary and intestate succession to chattels. This meant that the common law lost sight of the wife's right to chattels on the death of her husband. It looked only at the state of things which existed while the marriage lasted; and, during this period, both in countries which recognized community and in countries which did not, its chief feature was the absolute control of the husband. Thus the common law naturally tended to magnify the control of the husband to such a degree that it literally gave him the chattels of the wife, and denied the wife any capacity to own them. * * * (2) As we have seen, the common law made the law of the nobles the law for all." (The author then quotes from Brissaud to the effect that "community is the law of the merchants," etc., see page 55, *infra.*)

In a learned monograph, "Married Women's Property in Anglo-Saxon and Anglo-Norman Law," 4 Annals of American Academy of Political and Social Science 233

(1893), by Florence G. Buckstaff, it is stated (page 261):

"I have already said that the system of married women's property set forth by Glanvill [lawyer and justiciar of latter part of Henry II's reign, 1154-1189] continued in force in England until the present generation.

"On the continent the feudal disabilities were gradually mitigated, and the doctrine that husband and wife were one person soon became obsolete. The reason for the duration of these disabilities in England is bound up with the whole history of the English people, which preserved an anomalous feudal family law by the side of great and growing constitutional and political liberties. Laboulaye's description of the aristocratic system in France may perhaps be held to apply in England. The growth of the aristocracy, he says, and the idea of families as units, increased the tendency to ignore women and younger sons. 'To maintain the nobility existing, to enrich it with new fortunes, to raise the bourgeoisie to nobility was the constant aim of jurisconsults and legislators.' In the fifteenth and sixteenth centuries primogeniture and the exclusion of women were looked upon very favorably. 'Quia da familiarum conservationem praesertim ordinantur et diriguntur.' * * * Sir Frederick Pollock also says [Land Laws, page 113], 'It might be a topic of curious meditation for the student of comparative jurisprudence to note how well the English land-owning families have striven, though all unconsciously, to produce in our modern society something like the image of an archaic Aryan household.'"

On page 264 the author comments on "the curious fact that the Norman dower of one-third the real estate,

which superseded the community of property of our Anglo-Saxon forefathers, is still the rule eight centuries later in a large number of the laws of a race which has no prouder name for itself than Anglo-Saxon."[11]

Anticipating an argument more fully developed later (page 46, *infra*), it is the more "archaic social anatomy" referred to by the French historian, which Congress now seeks to impose upon all the people of the United States in disregard of local tradition or "inveterate policy."[12]

American Continent. Naturally the conflict between the common law and the community system was transplanted to the North American continent, settled by French, Spanish and English. For generations prior to the English conquest of Canada in 1763, the people of a large part of that country had been living under French laws and customs (Howe, *Roman and Civil Law in America*, 16 Harvard Law Review 342, 345 (1903); de Funiak, *Principles of Community Property*, Section 14). And those laws, as to marital property at least, still prevail in the Province of Quebec (*Beaudoin v. Trudel* [1937], 1 Dom. L.R. 216, 221).

By a charter granted in 1712 by the King of France (see *Kaskaskia v. McClure*, 167 Ill. 23, 30, 47 N.E. 72, 73), the royal edicts and the *Coutume de Paris* (including, presumably, the community property system) be-

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[11]The right of dower, given by the common law to the wife in place of a community interest was, we submit, always a flimsy, and with the decline of the economic importance of real property (see *Helvering v. Hallock*, 309 U.S. 106, 118, 84 L. ed. 604 (1940)), it became almost a fraudulent, device. Indeed, the origin of this right, commented on, *infra*, page 57, supports, we believe, the view that dower, an institution adopted by the Norman aristocracy, was never intended to be of great benefit to its beneficiaries.

[12]Mr. Justice Roberts in *Commissioner v. Harmon*, 323 U.S. 44, 89 L. ed. Adv. Ops. 71, at 72 (1944).

came law in the Mississippi Valley and the central Gulf regions originally settled by France (de Funiak, *Principles of Community Property*, Section 40). In 1769, by proclamation of Governor Alexander O'Reilly, the French community system was supplanted by the Spanish (Wigmore, *Louisiana: The Story of Its Jurisprudence*, 22 Am. L.R. 890 (1888); de Funiak, Section 40). For a time prevalent in the east Gulf region, where Spanish law remained in effect until altered by the government of the United States after the cession of Florida in 1819 (*American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 511, 544, 7 L. ed. 242; de Funiak, Section 44); the community system finally yielded to the common law in the east and central Gulf areas (see *Riddick v. Walsh*, 15 Mo. 519, 535 to 537; de Funiak, Sections 42, 44), save in Louisiana, where it appears to have been consistently adhered to. (See de Funiak, Section 41.)

The southwestern region was part of Spain's new world possessions, and the *Novisima Recopilacion* of Spain, published in 1805, applicable to these territories, continued in effect the community system already established. (Schmidt, pages 88, 98, of *Historical Outline of the Laws of Spain*, cited Note 8, *supra*). Declaring its independence from Spain in 1821, Mexico continued to recognize the community system and later incorporated it into its law. (*Novisimo Sala Mexicano*, Book 1, Section 2a, Title 4 (Mexico, 1870), quoted in de Funiak, Section 15, n. 63); see Schmidt, *supra, Civil Law of Spain and Mexico* (page 12), Book I, Title 1, Chapter IV, Section 1.)[13]

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[13]In the Appendix, page 21, we quote the principal provisions of this strikingly modern law.

It is interesting to compare its enlightened precepts with the contemporary law of England on the same subject as set forth by Blackstone. See Appendix, page 18.

Under its first constitution, adopted at the time of its admission into the Union in 1845, Texas continued the community property system which had become traditional under the Spanish and Mexican regimes (de Funiak, Section 45).

Of five states, California, New Mexico, Arizona, Nevada and Utah, carved out of territory acquired by the United States from Mexico, the two first named continued the community system without interruption; and Arizona and Nevada adopted it shortly after they had experimented briefly with common law systems (Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States, 11 Washington Law Review 1 (1936)). Early Mormon religious practice, naturally sympathetic to common law concepts of a wife's status and marital rights, led to the rejection of the community system in Utah (de Funiak, *supra*, Section 49, page 104).[14]

Of the Oregon Territory, the States of Washington and Idaho, after a period of experimentation with the common law, abandoned it in favor of the community system (Kirkwood, *supra*). Oklahoma, in 1945, independently of pre-existing customs or traditions (except for an experiment with an optional form, 1939 to 1945),

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[14]"No trace of a true conjugal society of goods, governed by the husband, is found in antiquity. Community, which implies a certain equality of rights between spouses, is evidently incompatible with polygamy, which creates a very inferior situation for women." (Gaëtan Aubéry, *La Communauté de Biens Conjugale* (Paris, 1911), page 180; our translation; for the original, see Appendix, page 9.)

adopted a "legal" community property system (House Bill 218, Twentieth Legislature, 1945, approved April 28, 1945, effective July 26, 1945), as did the Territory of Hawaii (Laws 1945, Act 273).

We have stated that community property goes back in its origins at least to the early Christian era. European customs, later crystallized into written laws, were in turn transmitted to the new world. Varying in details which it would serve no present purpose to explore, the community property laws of the various American states adhering to that system are alike in the respect that they confer upon the spouses property rights of equal dignity, constituting the husband the agent of the community for certain purposes. By reason of these similarities, it is possible to discuss the issues presented by the present cases in a broad way, ignoring minor divergences.

CONSTITUTIONAL QUESTIONS INVOLVED.

From the survey just completed, it is apparent that the Congressional concept, attaching the *as if* stigma to the wife's interest in community property and ascribing to it a fictional status, is unhistorical and unrealistic. But Congress, pursuing the objective which it sought to reach, had no alternative. Its action is necessarily based on the concept that the wife's interest is unreal, since to admit that the wife *is* a part owner would cause Congress, by its own admission, to transgress three constitutional limitations upon its powers: (1) It would contravene the Fifth Amendment; (2) it would violate the requirement of geographical uniformity; (3) it would become a trespasser upon a field reserved to the states.

II.

The 1942 Act Contravenes the Fifth Amendment.

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *." (Amendment V, Constitution of the United States.)

Manifestly one person's property cannot be included in another's estate for the purpose of assessing death duties. The applicability of this truism to the present case involves the premise that the wife is owner. Elaboration in support of this premise seems unnecessary, because (1) the point, fundamental to the taxpayers' position in the case now before the Court, is fully developed in other briefs on file; and (2) this Court in numerous cases has recognized and defined the wife's interest in community property in terms which, if adhered to now, are amply sufficient to uphold its integrity against Congressional interference.

In *Poe v. Seaborn*, 282 U.S. 101, 111, 75 L. ed. 239 (1930), the Court says, referring to the community property laws of Washington:

> "The books are full of expressions such as 'the personal property is just as much hers as his' (Marston v. Rue, 92 Wash. 129, 159 Pac. 111); 'her property right in it (an automobile) is as great as his' (92 Wash. 133); 'the title of one spouse . . . was a legal title as well as that of the other' (Mabie v. Whittaker, 10 Wash. 663, 39 Pac. 172).
>
> "Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both."

In *Goodell v. Koch*, 282 U.S. 118, 121, 75 L. ed. 247, the Court says, quoting from *La Tourette v. La Tourette*, 15 Ariz. 200, 137 Pac. 426:

> "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal."

In *Hopkins v. Bacon*, 282 U. S. 122, 126, 75 L. ed. 249:

> "* * * the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband * * *."

In *Bender v. Pfaff*, 282 U.S. 127, 132, 75 L. ed. 252:

> "* * * in Louisiana, the wife has a present vested interest in community property equal to that of her husband * * *."

In *Lang v. Commissioner*, 304 U.S. 264, 270, 82 L. ed. 1331:

> "Under the community property statutes of Washington, as interpreted below, one-half of the amounts of community funds applied to payment of premiums was property of the wife. To that extent she paid these premiums. * * *"

The Court's latest expression is the following:

> "The legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder. Under that system, as a result of State policy, and without any act on the part of either spouse, one-half of the community income vested in each spouse as the income accrued and was, in law, to that ex-

tent, the income of the spouse. * * *" (*Commissioner v. Harmon*, 323 U.S. 44, 46, 89 L. ed. Adv. Ops. 71, 72.)

See also *Warburton v. White*, 176 U.S. 484, 44 L. ed. 555; *Arnett v. Reade*, 220 U.S. 311, 55 L. ed. 477.

For convenience of reference, we note certain other authorities dealing with the quantum and nature of spouses' rights in community property.[15]

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[15](a) *The spouses as owners of their respective shares.*

In addition to United States Supreme Court cases cited above, see:

United States v. Goodyear, 99 F. (2d) 523, 38-2 USTC ¶9532 (C.C.A. 9; Calif.);

Schwartz v. Schwartz, 52 Ariz. 105, 79 P. (2d) 501, 116 A.L.R. 633 (1938);

Siberell v. Siberell, 214 Cal. 767, 772, 7 P. (2d) 1003 (1932);

Bank of America N.T. & S.A. v. Mantz, 4 Cal. (2d) 322, 327, 49 P. (2d) 279 (1935);

Kohny v. Dunbar, 21 Ida. 258, 268, 39 L.R.A. (N.S.) 1107 (1912);

Radermacher v. Radermacher, 61 Ida. 261, 100 P. (2d) 955 (1940), citing earlier Idaho cases;

Estate of Williams, 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916);

Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925);

Jenkins v. Huntsinger, 46 N.M. 168, 125 P. (2d) 327, 333 (1942);

Arnold v. Leonard, 114 Tex. 535, 545, 273 S.W. 799, 804 (1925);

McJunkin v. Republic National Bank, 131 S.W. (2d) 1085, 1089 (Tex. Civ. App., 1939);

Occidental Life Insurance Co. v. Powers, 192 Wash. 475, 74 P. (2d) 27, 114 A.L.R. 531 (1937), citing earlier Washington cases;

Re Coffey's Estate, 195 Wash. 379, 81 P. (2d) 283 (1938).

See also:

de Funiak, Sections 105 *et seq.*

(b) *The spouses as partners.*

Bender v. Pfaff, 282 U.S. 127, 131, 75 L. ed. 252 (1930);

Goodell v. Koch, 282 U.S. 118, 121, 75 L. ed. 247 (1930);

Fuller v. Ferguson, 26 Cal. 546, 566 (1864);

Property rights acquired by the spouses under community property law continue in full vigor on removal of the matrimonial domicile to, or the investment of community funds in property located in, a non-community state (*Succession of Popp*, 146 La. 463, 83 So. 765; *Depas v. Mayo*, 11 Mo. 314; *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477; *Johnson v. Commissioner*, 88 F. (2d) 952, 955 (C.C.A. 8), s. c., 105 F. (2d) 454, cert. den. 308 U.S. 625; I.T. 1268, I-1 C.B. 234 (1922); 3 Mertens Law of Federal Income Taxation, Section 19.33; Restatement, Conflict of Laws, Section 292; 2 Beale, Conflict of Laws, Section 292.1; Horowitz, Conflict of Laws in Community Property, 11 Wash. L.R. 212, 221, 222). Indeed, the final authority in the United Kingdom has applied this principle to a case where the wife's right in

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Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 39 L.R.A. (N.S.) 1107 (1912);
Succession of Wiener, 203 La. 649, 14 So. (2d) 475 (1943), app. dism. 321 U.S. 253;
Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916);
de Funiak, Section 95.

On recognition of marital partnership for estate tax purposes, see L. L. Fletcher Estate, 44 B.T.A. 429 (1941; acq.).

(c) *The spouses as tenants in common.*

Some authorities suggest an analogy between community property and tenancy in common:

Warburton v. White, 176 U.S. 484, 496, 497, 44 L. ed. 555 (1900; community property is common property);
Williams Estate, 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916);
Re Coffey's Estate, supra (undivided one-half interest).

Interests held by tenants in common are severable for tax purposes. *Estate of Irwin A. Smith*, 45 B.T.A. 59 (1941; acq.); Reg. 105, Section 81.22 (first paragraph, last sentence).

That there are irreconcilable differences between tenancy by the entirety or joint tenancy on the one hand, and community property on the other is pointed out clearly in the appellees' briefs in these cases, in connection with *Tyler v. United States*, 281 U.S. 497, 74 L. ed. 991, and *United States v. Jacobs*, 306 U.S. 363, 83 L. ed. 763. We concur in what is said there.

movables acquired in a common law jurisdiction, was merely equitable, based upon the consequences which the community property law of the place of marriage—the then domicile of the parties—attached to marriage (*De Nicols v. Curlier* (1900), A.C. 21 (H.L.); see also *De Nicols v. De Nicols* (1900), 2 Ch. Div. 410, applying the same principle to real property interests acquired in the common law jurisdiction). It seems, however, that the American authorities have not carried to this particular extent the doctrine of contract implied from the mere fact of marriage under the community property regime. (See *Saul v. His Creditors,* 5 Mart. (N. S.) 569 (La., 1827)).

The authorities cited show that the law of the new domicile will afford an appropriate remedy to protect rights acquired in the old, either by raising a trust in favor of one spouse (usually the wife) or by treating the spouses as co-owners.

As the present Chief Justice has well pointed out in an opinion rendered while Attorney General (34 Ops. Atty. Gen. 395, 402, Treasury Decision 3670, IV-1 C.B. 20, 24), there are difficulties in applying common law terminology to community property. Admitting that difficulty, we believe it to be one which the Court, following the uniform course of decision in the community property states, has itself satisfactorily resolved, by attributing equal ownership to the spouses. Courts of common law states faced with the problem of protecting the spouses' interests in property, community in origin and brought within their borders, have resolved it by applying the same concept.

In view of the fact that this Court, the courts of the community property states themselves, and, on appropriate occasion, the courts of states to which community

property is a stranger, all concur in applying this test, is it not too late to say that for tax purposes, *and for tax purposes only*, the wife's interest is less than that which the governing law says it is? Admitting that ownership of property furnishes a sound basis for taxation, the tax laws, we submit, may not be permitted to supply their own standards for determining whether ownership exists. We shall consider presently (see page 26, *infra*) whether there is some basis other than ownership on which the tax can be sustained.

Referring to a state statute which in effect compelled one person to pay another's tax, this Court said in *Hartman v. Greenhow*, 102 U.S. 672, 684, 26 L. ed. 271 (1881):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger can not be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall if at all upon another."

Property which a decedent has owned but has effectually parted with during his lifetime may not be brought back into his estate for tax purposes by subsequently enacted laws. (*Nichols v. Coolidge*, 274 U.S. 531, 71 L. ed. 1184 (1927; federal estate tax); *Coolidge v. Long*, 282 U.S. 582, 75 L. ed. 562 (1931; state inheritance tax).) Property similarly parted with may not be brought back into the estate by laws establishing a conclusive presumption as to the motives attending its transfer. (*Schlesinger v. Wisconsin*, 270 U.S. 230, 70 L. ed. 557 (1926; state statute); *Heiner v. Donnan*, 285 U.S. 312, 76 L. ed. 772 (1932; Federal Estate Tax Act).)

The tax being on the interest which ceases at death (*Y.M.C.A. v. Davis*, 264 U.S. 47, 68 L. ed. 558; *Edwards v. Slocum*, 264 U.S. 61, 68 L. ed. 564; *Chase National Bank v. United States*, 278 U.S. 327, 73 L. ed. 405), some substantial interest must cease at death to give rise to a taxable event. (See also authorities, page 31, *infra.*)

If, as the opinion in *Heiner v. Donnan* points out, the value of a decedent's estate cannot be enhanced by the "fictitious inclusion" of property given away within two years prior to his death, with how much stronger reason may it be said that the estate cannot be enhanced by the fictitious inclusion of property which the decedent never owned at all.

The *Donnan* case condemns an attempt to measure a tax on one person's property by imputing to it in part the value of property of another, as "not taxation, but spoliation" (page 327 of 285 U.S.). Of tax burdens distributed in accordance with another's wealth, the Court (quoting Judge Learned Hand in *Frew v. Bowers*, 12 F. (2d) 625, 630), refers to the "grievous injustice" occasioned by that procedure.

Concerning an analogous question, that of the right to measure a husband's income by income belonging in part to his wife, this Court has said in *Hoeper v. Tax Commission*, 284 U.S. 206, 215, 76 L. ed. 248 (1931), a case coming up from Wisconsin and involving its income tax law:

> "Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in

part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U.S. 41, 77, 44 L. Ed. 969, 20 S. Ct. 747, is apposite:

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U.S. 531, 540, 71 L. ed. 1184, 1192, 52 A.L.R. 1081, 47 S. Ct. 710.)"

We are aware that the great and revered Justice Holmes—Justice Brandeis and the present Chief Justice joining—dissented in the *Hoeper* case. That dissent detracts not at all from, indeed it supports, the authority of the majority decision as applied to the instant cases. Justice Holmes was upholding the authority of the state legislature over a matter of state concern, as we are here. Differing from the majority, he thought the legislature could go back to a common law rule if it saw fit.[16]

[16]The Holmes philosophy of non-interference with state laws is well stated in his dissent in *Truax v. Corrigan*, 257 U.S. 312, 344, 66 L. ed. 254.

No conflict between state and federal authority over a state's internal concerns was involved. To reason that because Justice Holmes considered the state an agency competent to deal with its internal economy in that case, he would believe the federal government empowered in this to *overrule* that same agency, dealing with the same subject matter, seems lacking in coherence.

It is believed that the authorities cited above establish that a tax cannot be levied upon the property or estate of one person in respect of the property or estate of another; and that the inclusion of one person's *community* estate with another's for purposes of taxation falls within the condemnation of the same just principle. The federal estate tax being levied on the "exercise of the privilege of directing the course of property after a man's death" (*Estate of Rogers v. Helvering*, 320 U.S. 410, 413, 88 L. ed. 134), and that privilege being here non-existent, there is no subject matter to which the tax can apply.

BASIS AND SCOPE OF THE FEDERAL ESTATE TAX.

It is appropriate to note at this point an argument advanced by the Attorney General (see App. Br., *Wiener* case, pp. 22, 58, 59, *et seq.*) that ownership is not the exclusive basis of estate taxation. Admitting that generality, it becomes necessary, in order to determine the validity of the further conclusion that the wife's rights with respect to her share of the community property are "enlarged" by her husband's death in such sense or degree as to subject them to taxation at his death (App. Br., *Wiener* case, pp. 22, 61), to inquire what bases are here employed, and what are permissible.

Ownership, as has been said, is one test. The gross estate includes all property "to the extent of the interest

of the decedent therein" (Sec. 811(a), I.R.C.). The surviving spouse's interest as dower or curtesy—an expectancy depending upon the spouse's survival to determine whether it ever comes into existence—is included (811(b)). Substitutes for testamentary disposition—transfers in contemplation of death (811(b))—are included, as are those transfers whereby the transferor has retained the substance, total or partial, of ownership through retention of economic benefits—possession or enjoyment, income, right to designate the final takers, or to revoke (811(c), (d)).

The next category, joint interests (811(e)(1)), presents in one aspect a substitute for testamentary disposition. The further fact that on one joint tenant's death, the survivor is freed from the hazard of a transfer, voluntary or involuntary, by his co-owner, whereby the survivor's right to take the whole of the property would have been defeated, makes plain the "accessions to the survivor's property rights," and justifies the tax (*Gwinn v. Commissioner*, 287 U.S. 224; 229, 77 L. ed. 270; *United States v. Jacobs*, 306 U.S. 363, 83 L. ed. 763). To close the door to facile evasion, the Act looks back to the original source of the property, even though it may have been in whole or part acquired by the surviving joint tenant by a gift from the co-owner made prior to the enactment of the Federal Estate Tax Act (*Dimock v. Corwin*, 306 U.S. 363, 83 L. ed. 763).

The remaining category, powers of appointment (811(f)), requires no comment. If the provisions of Section 811(e)(2) relating to power of testamentary disposition stood alone, there could be no valid objection on the part of the community property states. (See *Whitney v. State Tax Commission*, 309 U.S. 530, 84 L. ed. 909.)

Where, among the enumerated categories, does the present attempt at taxation fall? It is not based on ownership (811(a)), for the deceased husband did not own his wife's share of the community property (see cases cited, page 19, *supra;* also Note 15); not on dower (811(b)), for the wife's vested interest has no resemblance to this expectancy; not on substitute for testamentary disposition (811(c)), for the husband had no power to dispose of his wife's share; not on economic benefits retained (811(c)(d)), for the husband had none as to his wife's share, except a non-beneficial, perhaps indeed burdensome, power of control as statutory agent; nor is it based on power of appointment, non-existent as to his wife's share.

Failing to bring the case within any known classification, it is not surprising that the Government, groping among "shadowy and intricate distinctions of common law concepts and ancient fictions" (*United States v. Jacobs,* 306 U.S. 363, 369, 83 L. ed. 763), seeks to find some minute alteration in the survivor's relationship to the property which justifies the tax (see App. Br. p. 33 *et seq.*). The argument cuts both ways. True, the surviving wife has the power, formerly restricted but now full, to alienate the property. On the other hand, all questions of mere sentiment aside, having lost the services of her statutory agent, she must assume the burdens of management. Either through her agent acting alone, or, in case of real property, by acting in concert with him, she could always alienate or encumber, if that is beneficial.[17] Does this accession to her power—and to her

[17]From the existence of restrictions on the wife's power of disposition of community property while her husband is living it is not to be inferred that she has no alienable interest. There would seem to be no doubt of the wife's power to make a binding agree-

responsibility—have the effect of passing to the surviving wife the "substantial rights" of which the Court speaks in *Tyler v. United States*, 281 U.S. 497, 503, 74 L. ed. 991, or of "bringing into being or the enlargement of property rights" (*id.*, p. 502), or of "definite accessions to the property rights" (*id.*, p. 504) of the surviving spouse? To say that anything less than *substantial* benefits must be transmitted in order to give rise to the tax would be inconsistent with this Court's intensely practical concept of taxation, often reiterated and unfailingly applied.

In the *Tyler* case, the Court is speaking throughout of "property rights"—with particular appropriateness, because until her husband's death, Tyler's widow had no assurance that she would ever own or possess the property in question, and the same applies to the joint tenancy involved in *United States v. Jacobs*, 306 U.S. 363, 83 L. ed. 763. In the instant case, the surviving widows

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ment to leave a will disposing of her share of the community property in a particular manner. *Sonnicksen v. Sonnicksen*, 45 Cal. App. (2d) 46, 113 P. (2d) 495. On the point that heirs or other persons receiving property descending or left to them in contravention of such an agreement become involuntary trustees for the promisee, and that the agreement is in effect specifically enforcible, through recognition of the implied trust, see *Sonnicksen v. Sonnicksen, supra; Fowler v. Hansen*, 48 Cal. App. (2d) 518, 522, 120 P. (2d) 161; *Notten v. Mensing*, 3 Cal. (2d) 469, 45 P. (2d) 198; *Jones v. Clark*, 19 Cal. (2d) 156, 119 P. (2d) 731. The rule just stated is not peculiar to community property but prevails generally. See 4 *Page on Wills* (3rd ed.), Section 1736.

The same reasoning leads to the conclusion that a wife has the power to make a conveyance, effective at her husband's death, of her share of the community property. The case of *Lynch v. Lynch*, 207 Cal. 582, 279 P. 653, involving a 1916 transfer, so holds. In view of the fact that in 1927 the wife was given a "present, existing and equal interest" with her husband in community property (California Civil Code, Section 161a) it is apparent that the same result could now be reached on grounds supplemental to or independent of the ground—after-acquired interest—relied on by the court.

owned an interest which no contingency could defeat, either before or after their husbands' deaths.[18] And it must be remembered that, since this is a transfer, not a succession statute, any "accession" to the widows' rights must come from their husbands (see cases cited p. 24, *supra*, p. 35, *infra*, also Note 18). Otherwise there is no subject matter to which the tax can apply.

In a further effort to find a supporting basis for the

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[18]The Government's reliance (App. Br. pages 7, 44) on *Moffitt v. Kelly*, 218 U.S. 400, 54 L. Ed. 1086 (1910), is misplaced. That case arose in 1906, some seventeen years before a wife in California had even the power of testamentary disposition over her half of the community property (see Calif. Stats. 1923, page 30). Her rights constituted a mere expectancy, as this Court was later to hold in *United States v. Robbins*, 269 U.S. 315, 70 L. ed. 285 (1926). The additions to the wife's rights in community property which culminated (1927) in Section 161a of the Civil Code, declaring that the "respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests * * *" were given recognition by this Court in *United States v. Malcolm*, 282 U.S. 792, 75 L. ed. 714.

The controlling facts just recited must be kept in mind in connection with the Court's assumption in the *Moffitt* case that "the wife's interest in the community property was a vested right which could not be impaired by subsequent legislation." (Page 403 of 218 U.S.) The wife's rights being "vested," to the extent and only to the extent noted above, it is not surprising that the Court reached the further conclusion that it was within the power of the state "to select the vesting in complete possession and enjoyment by wives of their shares in community property, consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof" as a taxable event. It is to be noted also that in the *Moffitt* case the Court was dealing with a succession, not a transfer tax. (See *United States Trust Co. v. Helvering*, 307 U.S. 57, 60, 83 L. ed. 1104; *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155, 73 L. ed. 647; *Knowlton v. Moore*, 178 U.S. 41, 49, 44 L. ed. 969; *Paul, Federal Estate and Gift Taxation*, Section 1.05). In *Moffitt v. Kelly*, there was a definite "accession" to the wife's rights at her husband's death. She had nothing tangible before. Without further elaboration on this point, we concur in what is said in the briefs of the appellees regarding the applicability of *Moffitt v. Kelly* to the present situation.

tax, the Government (App. Br. p. 38), reverts to the Congressional concept that the wife's interest is a fiction. We have endeavored to show throughout this brief that this theory is unsupportable in fact or law. If the wife's ownership is accepted, as we believe it must be; if the theory of substantial accession to her rights in her community half at her husband's death, sufficient to constitute a taxable event, is rejected, as we believe it must be; it must follow that the Government, following the joint tenancy analogy, is remitted to going back to the source—finding to whom the property is "economically attributable." Whether the Government can attribute the entire property to one spouse in defiance of state law, one of the major problems dealt with in this brief, is discussed under Points IV and V, *infra*.

III.

The 1942 Act Contravenes the Requirement That Excise Taxes Be Uniform.

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; * * *." (Constitution of the United States, Article I, Section 8, Clause 1.)

The contention made under this heading is founded upon the conviction that the uniformity clause was inserted for a purpose, and the belief that the instant case presents an unprecedented situation, favorable to its application.

The federal estate tax is an excise upon the privilege of transmitting property at death (*United States Trust Co. v. Helvering*, 307 U.S. 57, 83 L. ed. 1104; *Porter v. Commissioner*, 288 U.S. 436, 77 L. ed. 880). To bring

the statute into operation, death must be the "generating source" (*Knowlton v. Moore*, 178 U.S. 41, 56, 44 L. ed. 969). It must be "the source of valuable assurance passing from the dead to the living" (*Porter v. Commissioner, supra*). The subject matter of the excise is "the transfer of or shifting in relationships to property at death" (*United States Trust Co. v. Helvering, supra*).

It is true that this Court has said in *Poe v. Seaborn*, 282 U.S. 101, 117, 75 L. ed. 239, as in other cases, that "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity." In the instant case, differences of state law do not have to be read into the Act. Congress has itself read these differences into the Act by limiting the applicability of certain provisions to those states in which the community system prevails.

This, we believe, makes clear the fallacy underlying the Government's statement (App. Br., *Wiener* case, p. 8) that any disadvantage resulting to the community property states from this legislation "would be the result not of the federal statute, but of differences in state laws," citing *Florida v. Mellon*, 273 U.S. 12, 71 L. ed. 511. In that case, Florida, by its own constitution, had incapacitated itself from taking advantage of a privilege made available by federal law to *all* the states. In the instant cases, no privilege is accorded but a tax is imposed. It is imposed, moreover, not in all the states but only where the community system prevails, rejecting in those states, while accepting in all others, the tests supplied by state law to determine "the extent of the interest of the decedent" in property. The 1942 Act invents, in the case of the husband, an interest which does not exist. *Except*

for the purpose of taxing the wife's estate, it purports to nullify the interest which the state law says she has.

Directed and limited as the 1942 Act is, affecting only nine states, it does not operate with geographical uniformity with respect to the transfer of property. It is no answer to say that the statute applies in whatever states may now or hereafter come within the named category. Still undisposed of is the fact that the community relationship is made the object of special and discriminatory legislation not made applicable to other property relationships essentially indistinguishable from it. (See argument under Poinf II, *supra.*)

The language of this Court in *Knowlton v. Moore,* 178 U.S. 41, 89, 44 L. ed. 969, 988, is applicable to the present cases:

> "Giving to the term uniformity as applied to duties, imposts and excises a geographical significance likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts or excises upon a particular subject in one state and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point, the Court (page 84) states a contention of counsel respecting this matter which the opinion later upholds, as follows:

> "* * * the words, 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be

made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate."

The 1942 Act does not make operative "the same plan and the same method * * * throughout the United States." Since essentially similar property relationships in non-community states, namely, property held by the wife as a tenant in common or partner with her husband, go free at the husband's death, the 1942 Act does not tax the same subject "everywhere throughout the United States." Since the method of taxation devised by the Act results in including in the husband's estate property which he does not own, it taxes the transfer of property which he *does* own at a higher rate than would otherwise be applicable to him, and at a higher rate than would be applicable to the same property in a non-community property state. The Act therefore does not tax the same subject "at the same rate." It does the very thing which this Court in the first excerpt above quoted says cannot be done, namely, it levies an excise "upon a particular subject in one state and a different duty, impost or excise on the same subject in another." In terms directed only at certain states—a feature which it is believed will not be found in any other excise statute—it is for that reason *prima facie* at variance with the requirement of geographical uniformity. But aside from this, it is at variance with that requirement for the further reason, not patent upon the face of the statute itself, that in determining whether transfers are subject to or free from

taxation, it applies inconsistent and arbitrary, and therefore non-uniform, rules.

Since it is the shifting of economic benefits, or the privilege of transfer, which is taxed (*United States Trust Co. v. Helvering*, 307 U.S. 57, 83 L. ed. 1104; *Estate of Sanford v. Commissioner*, 308 U.S. 39, 43, 84 L. ed. 20), it follows that if no benefits (as to the wife's community half) are shifted at the husband's death, there is no subject matter on which the tax can operate. Death is not, as to the wife, the generating source of any new economic interest.[19] It has only removed one who stood in the relationship of a statutory agent with respect to the property (*Poe v. Seaborn*, 282 U.S. 101, 75 L. ed. 239). As well might it be said that a principal is to be taxed at his agent's death, or a *cestui que trust* at the death of the trustee. Nowhere, save in the community property states, is a tax exacted from the beneficial owner upon the death of a person exercising only managerial powers over the owner's property[20]—non-beneficial powers which the legislature gave and can take away at will.

In thirty-nine states only that property is included in the husband's taxable estate which answers to one of the tests summarized above (see pages 26 to 28, *supra*), deemed sufficient to give rise to the taxable event, the shifting of economic benefits, at his death. In nine states, under the 1942 Act, property is included as to which these

[19]See *Whitney v. State Tax Commission*, 309 U.S. 530, 538, 84 L. ed. 909.

[20]On the cessation of such powers as a non-taxable event, see *Estate of Williams*, 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916).

indispensable conditions do not exist. This results in two inequalities, both violative of the uniformity requirement:

(1) Property not owned by the decedent, the devolution of which he could not control, as to which no valuable assurance passed at his death to the living (*Porter v. Commissioner*, page 32 *supra*), is brought within his taxable estate.

(2) As a consequence, the property which is rightly included within his taxable estate is subjected to higher rates because of this wrongful inclusion.

It would be inaccurate to say that this is but another way of stating the argument based upon the Fifth Amendment, namely, that the property not being the decedent's cannot be taxed at all.[21] The Act might run the gamut of the Fifth Amendment, and still fail in the uniformity test, because it singles out for taxation a property system—an incident of the marital relationship, non-existent in its absence—and says that property rights arising out of that system shall be subjected to a discriminatory burden. This denies uniformity, to the disadvantage of those communities of the Union whose legislative and social policy has given origin to the rights now subjected to discrimination.

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[21] In so far as the claims of the community property states are based only on unreasonable classification or inequality in the incidence of the tax, it seems that the Fifth Amendment affords them no remedy. *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 86 L. ed. 343 (1941); *Hirabayashi v. United States*, 320 U.S. 81, 87 L. ed. 1774 (1943).

IV.

The 1942 Act Invades the Powers Reserved to the States.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Amendment X, Constitution of the United States.)

The instant cases present an issue going beyond the Fifth Amendment and the uniformity clause—points previously dealt with. The Act, we respectfully submit, constitutes an interference with state policy and economy. If a state says that the wife's contribution to community earnings is equal to the husband's, can that view be said to be so palpably erroneous that Congress may override it at will?

A present-day writer states the social theory underlying the community property system:

> "* * * actually there is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage. The wife usually remains the home maker, the husband the bread winner, and because his share thus has to do with the earnings and properties acquired their management remains in his hands." (de Funiak, Principles of Community Property, Section 95, page 265.)

See also authorities cited under heading V, *infra*.

Tersely, in an opinion which this Court has quoted (*Poe v. Seaborn*, 282 U.S. 101, 111), the Washington Court expresses the community concept: "The personal property is just as much hers as his. * * * Under our law she

has helped to create it as much as he." (*Marston v. Rue*, 92 Wash. 129, 131, 159 P. 111 (1916).)

The community property states have created a system of property rights based upon the belief that accumulations of property, the product of labor, are attributable to the wife equally with the husband; or upon a policy which courteously ascribes to them a corresponding ownership. The belief may be erroneous. The policy may be attributed, flatteringly, to generosity to women, or less flatteringly to duress on their part. Whatever the actuating motives, Congress still may not interfere with the system merely because it looks strange to residents of other states and to lawyers schooled only in the common law.

The theory applied by Congress—unintentionally, we believe—that it can promote or render nugatory state systems of property laws as it will, does not stand scrutiny. The most extreme advocates of the common law system will doubtless concede that the wife's contribution to the marital enterprise is worth *something*. This would be true even though limited to the case quaintly put by *Brissaud* (*op. cit.*, page 836) of the wife performing her part "as mistress of the house, as pictures show her, carrying her keys and her purse at her belt." How much are the wife's services worth, if, as Congress thinks, fifty per cent is too much? Would forty per cent be reasonable? Or thirty? Who will bid twenty-five? Am I offered twenty? It should be possible to pursue this inverted auction to a figure which even bachelors will say is reasonable. That measure of compensation being reached, and assuming it is allowed by state law, has Congress the power to take it away from the wife at the husband's death?

Human relationships being what they are, their component elements are difficult to appraise. The apparently

imponderable may outweigh the outwardly weighty and substantial. Who has not known cases where the wife was the dynamic or at least the conserving agency? If, as we consider it reasonable to suggest, the wife's contribution has *some* value, the matter of appropriate reward is solely a question of how much—a matter referable to state law. The spouses are partners (see Note 15, *supra*), a relationship which presupposes an element of give and take. Such cases do not call for the use of mathematical formulae of such exactness as a physicist dividing an atom might require. Approximations are sufficient. If the state law says fifty per cent is reasonable for the wife's contribution, can Congress say that the reward is exorbitant, and only some lesser amount, or nothing, is to be awarded?

The community states have said that fifty per cent of the acquests is a proper reward. This Court has recognized and given the appropriate consequences to this exercise of state power (see *Poe, Goodell, Hopkins, Bender, Lang, Harmon* cases, all cited *supra;* see also *Warburton v. White,* 176 U.S. 484, 44 L. ed. 555 (1900; Washington); *Arnett v. Reade,* 220 U.S. 311, 55 L. ed. 477 (1911; N.M.);[22] *United States v. Malcolm,* 282 U.S. 792, 75 L. ed. 714 (1931; Calif.)).

The framers of the Constitution did not freeze into it common law property concepts.

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding

[22] As the opinion in *Arnett v. Reade* points out, page 319 of 220 U.S., there is nothing in *Garrosi v. Dastas,* 204 U.S. 64, 51 L. ed. 369 (1907) which is inconsistent with the uniform course of the Supreme Court's holdings regarding the rights of spouses in community property.

future, and for a people gathered and to be gathered from many Nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. * * *" (*Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232.)

The concepts of marital property rights which the common law sponsored are not necessarily those adapted to the needs of "an undefined and expanding future," nor is their continuance necessarily contemplated "in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (*Marshall, C.J., in M'Culloch v. Maryland*, 4 Wheat, 316, 415, 4 L. ed. 579). Realistically and impartially surveyed, those concepts are part of the "feudal economy," now somewhat in disrepute (*Helvering v. Hallock*, 309 U.S. 106, 118, 84 L. ed. 604),[23] to which the 1942 Act seeks to impel return.

Property rights are a part of the vast sphere affecting the people in their daily lives, reserved to the states respectively or to the people under the Tenth Amendment. To say that property belongs entirely to the husband when the law under which it came into existence says one-half of it belongs to the wife, is to substitute a federal for a state system of property rights. To sustain Congress in de-

[23]Not only has the Court shown somewhat less than full respect for the "feudal economy." It has on various occasions disengaged "the dead hand of the common law" by which that economy was supported. *Rosen v. United States*, 245 U.S. 467, 471, 62 L. ed. 406 (1918); *Funk v. United States*, 290 U.S. 371, 378, 78 L. ed. 369 (1933); *United States v. Provident Trust Co.*, 291 U.S. 272, 78 L. ed. 793 (1934). We shall endeavor to show that the marital property systems of the common law states still lean upon that same dead hand.

rogating from property rights conferred by state law, putting them on an *as if* basis, destroying the substance and leaving only the shadow, is to substitute a federal for a state system of property rights.

This attempt to add to the husband's rights, and to derogate from the wife's, goes beyond the authority of Congress.

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America but from the people of the several states; and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument." (Marshall, C.J., in *Sturges v. Crowninshield,* 4 Wheat. 122, 193, 4 L. ed. 529, 548 (1819).)
>
> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (Marshall, C. J., in *Dartmouth College v. Woodward,* 4 Wheat. 518, 629, 4 L. ed. 629, 657 (1819).)

Conceding that the national government has "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States v. Darby,* 312 U.S. 100, 124, 85 L. ed. 609 (1941)), it is still sound constitutional doctrine that "the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." (*United States v. Cruickshank,* 92 U.S. 542, 551, 23 L. ed.

588, 591 (1876).) It is as true now as it was in John Marshall's day that the government is "one of enumerated powers." (Marshall, C.J., in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601 (1819).)[24]

The domain of property rights is reserved exclusively to the states.

> "The power of the State to limit the tenure of real property within her limits and the modes of its acquisition and transfer and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. * * * The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." (Field, J., in *United States v. Fox*, 94 U.S. 315, 320, 24 L. ed. 192 (1887).)[25]

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[24]See also *United States v. Butler*, 297 U.S. 1, 63, 80 L. ed. 477, 487 (1936); *Screws v. United States*, 89 L. ed. Adv. Ops. 1029, 1040 (1945).

[25]*Federal taxation as dependent upon property rights determined by state law.* On state law as governing possibility of revesting trust property in the grantor, see *Helvering v. Stuart*, 317 U.S. 154, 161, 87 L. ed. 154 (1942). State law determines upon whom local taxes are imposed. *Magruder v. Supplee*, 316 U.S. 394, 396, 86 L. ed. 1555 (1942). See also *Freuler v. Helvering*, 291 U.S. 35, 78 L. ed. 634 (1934); *Blair v. Commissioner*, 300 U.S. 5, 81 L. ed 465 (1937); *Uterhart v. United States*, 240 U.S. 598, 60 L. ed. 819 (1916); *Sharp v. Commissioner*, 303 U.S. 624, 82 L. ed. 1087 (1938). We note also the following non-tax cases on the supremacy of state law in matters affecting property rights: *Huddleston v. Dwyer*, 322 U.S. 232, 88 L. ed. 1246 (1944); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 85 L. ed. 109 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 85 L. ed. 139 (1940).

It will be admitted that "the revenue laws are to be construed in the light of their general purpose to establish a nation-wide

Without multiplying quotations, the following recognize or apply in one form or another the principle that the state is sovereign except as to those matters which the Constitution commits to the Federal government:

Pennoyer v. Neff, 95 U.S. 714, 722, 24 L. ed. 565, 568 (1878);

Yonley v. Lavender, 88 U.S. 276, 22 L. ed. 536 (1875);

Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315, 338-340, 80 L. ed. 251 (1935).

The same rule applies to another question incidentally arising here, namely, the subject of the relationship of husband and wife, which this Court has held "belongs to the laws of the states and not to the laws of the United States." (*Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 74 L. ed. 489 (1930); see also *Williams v. North Carolina*, 89 L. ed. Adv. Ops. 1123, 1128 (1945).) A recent decision recognizes "property interests" as one of the "commanding problems in the field of domestic relations with which the state must deal." (*Williams v. North Carolina*, 317 U.S. 287, 298, 87 L. ed. 279 (1942)).

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scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." (*United States v. Pelzer*, 312 U.S. 399, 402, 85 L. ed. 913; see also *Morgan v. Commissioner*, 309 U.S. 78, 84 L. ed. 585.) To say that Congress may define a future interest (*Pelzer* case), or a general power of appointment (*Morgan* case), stops far short of saying that a federal statute purporting to tax *transfers* can tax the devolution of property *not transferred at all*, because under the state law which determines ownership, it does not belong to the transferor. As well might Congress say that the wife's property would be included in the husband's estate for federal estate tax purposes; or to make the parallel complete, that this inclusion would be required only in certain designated states.

In the 1942 Act, Congress is seeking to withdraw one of the incidents of the marital relationship from state control. If Congress, preferring the common law rule which regards property acquired during marriage "as belonging entirely to the husband," can employ that fiction as a basis of taxation in defiance of state law which says that it belongs in part to the wife, then a wide gap has been opened in the line protecting state authority over property rights from Federal encroachment. If Congress can say that in one state a transfer of 100% is taxed on that basis, and that in another a transfer of 50% is taxed as though it were 100%, there is manifest discrimination; and if, going still further, Congress can say that a person (the wife) who has *no* interest in the property which Congress is willing to recognize, is nevertheless taxed on the basis of owning 50%, there is manifest injustice. If the 1942 Act is upheld, is it probable that the community property states can withstand the pressure to go over to the system under which taxation bears some relation to, and does not ignore, ownership?[26] The retrogressive nature of such a move, and of

[26]A simple illustration will make clear the discrimination involved, and the consequent pressure on the community property states to go back to the "more archaic" social system (see *Brissaud*, page 14, *supra*). In a community state, on the wife's death, the 1942 Act subjects to taxation at least one-half of the community property. There is no corresponding exaction in non-community states. Assuming a five year period of survival between spouses, that the spouses leave to each other (as, it is believed, they should be privileged to do) their respective shares of property acquired during the marriage, and that the wife will predecease the husband in 50% of the cases, the following results: (1) In both community and non-community states, on the husband's death prior to the wife, all the property is subjected to the tax. Thus far (ignoring, for the moment, the fact that the husband's estate is taxed in respect of property he does not own), there is parity. (2) In non-community states, there is no tax on the wife's death prior to the husband, the tax being applicable only on his subsequent decease. (3) In the community states,

a law which impairs or infringes upon the more enlightened and generous property system, will be commented on later.

When the Federal government attempts to invade a field of action reserved to the states, it is not important that the attempted invasion is made under the guise of a taxing Act. In *Linder v. United States*, 268 U.S. 5, 17, 69 L. ed. 819, 823 (1925), the Court says:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced.[27]

When Congress, under the guise of a taxing Act, ignores property rights attaching at the moment of acquisition and recognized in full vigor by state law, its acts are in derogation of the authority of the states. The Federal Estate Tax Act is concerned only with *transfers*—those transfers occurring at, made in contemplation of, or rendered fully effectual only by death. To say that the transfer of A's property to B at A's death is taxable, is

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there is a tax on 50% of the property on the wife's death prior to that of the husband (50% of the cases), the tax again being applicable on his subsequent decease.

The writer of the note in 58 Harvard Law Review 742, referred to page 6, *supra*, concedes that "the community does bear a heavier tax burden when the wife predeceases the husband," citing *Jackson, New Federal Estate and Gift Taxes on Community Property*, 21 Tax Magazine 535.

[27]See also *United States v. Butler*, 297 U.S. 1, at 69, 80 L. ed. 477 (1936).

undoubtedly within the power of Congress. To say, however, that A's title will be expanded or diminished according to the will of Congress, ignoring the state law which alone grants and governs the right to acquire and to own, is to permit Congress to set aside the laws of the several states and to regulate their internal economy to a degree hitherto without precedent.

V.

The 1942 Act Invades the Right of the States to Regulate Their Internal Economy and Social Policy.

Under this heading, supplemental to that immediately preceding, we shall point out certain additional considerations which, we believe, make clear the manner in which the 1942 Act encroaches upon state authority, and the extent of that encroachment; also its possible consequences if the 1942 Act is sustained.

In *Commissioner v. Harmon*, 323 U.S. 44, 46, the Court refers to a community which is "made an incident of marriage by the inveterate policy of the state." That is the type of community which the present *amici curiae* are seeking to uphold. In supporting the "inveterate policy" of the states here represented, we think it proper to refer to some of the reasons, founded on concepts prevailing in those states as to what is necessary to achieve a good society, which have led to the adoption and continuance of the community system rather than any of the multitude of systems having common law origins. These reasons will illustrate the close dependence of marital property systems upon local policy, showing that external interference with the one necessarily infringes upon the other.

In the present cases the recurring problem of conflict between state and federal authority is presented in an

acute and novel aspect. For the first time, as far as our research has revealed, in its long and honorable history, Congress has written into the laws of the land, under the guise of a tax law, an enactment which restricts the minority of the states in the management of their own domestic economy, impairing their status as autonomous and equal partners in the federal union. And not only has Congress accomplished this unprecedented, and we believe, unconstitutional result. Unconsciously it has taken a step which is likely to impel these states to retrogressive measures, contrary to the spirit and tendency of the age. It would be a reflection upon the Court which pronounced such judgments as those in *Muller v. Oregon*, 208 U.S. 412, 52 L. ed. 551, and in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. ed. 703,[28] to say that it is or should be indifferent to the social implications of its decisions.

We quote, not as criticism, but as expressing the point of view of an illustrious scholar, the following from Oliver Wendell Holmes' "The Path of the Law" (*Collected Legal Papers*, page 184):

> "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. * * * I cannot but believe that if the training of lawyers

[28] See also cases cited, Note 39, *infra*. And see generally, Haines, The Role of the Supreme Court in American Government and Politics (University of California, 1944), page 26 *et seq.*; Frankfurter, Law and Politics (New York, 1939), page 48 *et seq.*; also by the same author, Mr. Justice Holmes and the Supreme Court (Cambridge, 1939), pages 1 to 9.

led them habitually to consider more definitely and explicitly the social advantage on which the rule they laid down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions." (See also Holmes, "The Common Law" (Boston, 1881), pages 35, 36.)

Concerning the approach of Justice Holmes' great colleague, Justice Brandeis, to constitutional questions, a qualified observer has said:

> "Note how carefully the latter's opinions sustaining the constitutionality of some new piece of legislation are as a rule documented so as to show the need or desirability of the legislation in question. (Cook, *Oliver Wendell Holmes: Scientist*, 21 A.B.A. Journal 211, 212 (1935).)[29]

We wish respectfully to note the fact that the number of people, and the territorial areas affected by the decisions in the present cases, give an importance to their social consequences which is unusual even in cases brought to this Court involving constitutional questions.

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[29]See also quotations from Woodrow Wilson and Mr. Justice Frankfurter, page 70, *infra*. Further on Justice Brandeis' views on constitutional interpretation, see his dissent in *Olmstead v. United States*, 277 U.S. 438, 471 *et seq.*, 72 L. ed. 944.

That the effect and tendency of a particular rule are relevant factors to be considered in determining its validity is familiar doctrine, by no means confined to American jurisprudence nor to constitutional law. In *Priestley v. Fowler*, 3 M. & W. 1, 5, 150 Eng. Rep. 1030 (Exch. 1837), Lord Abinger says: "It is admitted that there is no precedent for the present action * * *. We are therefore at liberty to decide the question upon general principles, and in doing so, we are at liberty to look at the consequences of a decision the one way or the other."

Social Aspects, and Diffusion, of the Community Property System.

We have endeavored to show that the community property system is not, as some Congressmen and an occasional law review or text writer supposes, an alien product, not fully comprehensible and somewhat sinister. It is in fact the most widely accepted marital property system in the world (Lobingier, *History of Conjugal Partnership*, 63 Amer. Law Review 250, 280 (1929)).[30]

The nine American states in which the system prevails comprise 34.5% of the territorial area of continental United States, excluding Alaska. In 1940, their inhabitants numbered 21,424,915, or 16.3% of the population of the United States (U.S. Dept. of Commerce, Sixteenth Census of the United States, Population, Volume I, page 14). Living within that area are some 16.6%

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[30]According to Aubéry, writing in 1911 (pages 385 to 462, *op. cit.*, Note 7, *supra*), the community system was at that time recognized, wholly or partially, either as of right or as a matter of convention in the following countries besides France and parts of the United States: Holland, Belgium, Germany, Switzerland, Italy (limited to acquests), Austria, Spain, Portugal, Denmark, Sweden, Norway, Monaco, Latin America and parts of Canada.

A writer under the heading "Community Property and Federal Taxes," in 444 C.C.H. Standard Federal Tax Service, ¶8889, says:

"* * * But the [community] system has its roots in more ancient lineage than the common law. It was the development of a democratic process wherein women ceased to be in the category of chattels but were given equal rights in property with their husbands. It was firmly established in eight of our American States long before the advent of income and inheritance taxes. Forms of community property may be found in Scotland, parts of Scandinavia, Switzerland, and the Netherlands. It is present in the Philippines, Puerto Rico, Cuba, France, Quebec, Mexico, Spain, the Virgin Islands, and the Spanish-American republics of Central and South America. It is also found in the Union of South America (and its mandated territories) and in Southern Rhodesia."

(5,029,842) of the married men and 16.6% (4,995,584) of the married women, in the United States (U.S. Dept. of Commerce, Sixteenth Census of the United States, *supra*, Volume IV, Part 1, page 160).[31] The above does not take into account Hawaii, with 423,330 inhabitants (1940 census), nor Puerto Rico, which has the Spanish community property system. (*Estatutos Revisados y Codigos de Puerto Rico* (1941), Articulo 1295, *et seq.*)

The wide diffusion and acceptance of the community property system are due, we believe, to the fact that the experience of centuries has proved it to be a just system, responsive to social needs.

The historian, Sir William Holdsworth, steeped in the learning and traditions of the common law, has this to say regarding the failure of the community property system to gain acceptance in England:

> "* * * Following the line of least resistance, the law rejected all idea of a community of property between husband and wife, and lost thereby the opportunities for development which are afforded by a system which recognizes such community." (*A History of English Law*, Sixth Ed., Rev., Volume 3, page 532.)

Of the community of acquests, the distinguished Spanish writer and teacher, Felipe Sanchez Roman, in his *Derecho*

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[31]We draw no inference from the fact that the community states have relatively something more than the average number of married persons. Whatever the significance of this fact, it indicates that the community system has not proved a deterrent to marriage—an institution which even the common law regards as worthy of being encouraged. *Re Liberman's Will*, 279 N.Y. 458, 18 N.E. (2d) 658, 122 A.L.R. 1 (1939); *Re Dettmer*, 176 Misc. 512, 27 N.Y.S. (2d) 609 (Surr., 1941), aff'd (mem.) 262 App. Div. 1032, 30 N.Y.S. (2d) 333, aff'd (mem.) 289 N.Y. 597, 43 N.E. (2d) 830, (1942).

Civil Español, 2d ed. (Madrid, 1912), Volume V, page 547, says:

> "It conforms with the *unity* of marriage, and at the same time with the individual right and liberty of each spouse; it presupposes respect for individual purposes and possessions, recognizing in the new personality engendered by the matrimonial state, *purposes* which are *peculiar* to it, distinct from the former. It proceeds from this idea to derive logically that of the necessity of economic *means*, which are *exclusive* to it, and assigns an individual proprietorship to the matrimonial entity, different from the individual proprietorship of the spouses. It transfers the management of this common patrimony to a single direction, generally that of the husband, not, through this means, omitting to contrive certain guaranties for the condominium which the wife has in the common marital property." (Emphasis the author's. Our translation; for the original, see Appendix, p. 27.)

The noted French scholar Troplong (page 54, *Du Contrat de Mariage*, 3rd ed., Paris, 1857) says (our translation; for the original see Appendix, p. 24):

> "Marriage is a society of two persons. What is more natural than to submit to the regime of the society, the goods of which they are proprietors? Does not their common life have as a consequence the joining of their industry, the commingling of personal property, the community of savings, as well as of acquests made in common? * * * The community is well adapted to the nature of marriage; the spouses work in common, blend and mingle their properties, their labors, and provide equally for the education and establishment of their children. It is especially in the poorer class, where ordinarily marriage contracts [settlements] are not made, that the community is appropriate to the situation of the spouses; in this class,

the wife works actively; by her cares and labors, she contributes to the common welfare, or to the support of the family. It is fitting then not to exclude her from profits; it is fitting to interest her in the success of the conjugal union and to admit her to participation in it, in default, at least of other agreements." (¶40, in part. See Appendix, p. 24.)

Aubéry, at page 522, *op. cit.* note 7, *supra*, after pointing out in familiar terms the wife's contribution to the domestic economy, says:

"Is it not equitable, as a return for this active mission, that the wife be admitted to share with her husband the acquests realized during the union?"

And on page 553:

"Judging by efforts of divers legislators, it is clear that humanity marches in the direction of social progress and the amelioration of the condition of women. In our time, in our households, there is less of moral or physical wretchedness [misères] than in the past." (For the original, of which the foregoing is our translation, see Appendix page 13.)

The same idea is expressed by a leading woman lawyer from a non-community state:

"The momentum of modern life flows in the direction of woman's progress. Any law that retards woman's advance would be fraught with grave social and political implications." (B. Fain Tucker, President, Women's Bar Association of Illinois, Women Lawyers' Journal, April, 1942.)

We quote from a journal of liberal opinion:

"The whole trend of modern law and progressive custom is to regard the wife as an individual, personally and economically." (New Republic, July 14, 1941, page 30.)

And from a commentator on the social sciences:

"The idea behind the community property system is on the whole a sound one, apart perhaps from the almost exclusive powers of management given to the husband. It recognizes by law the equality between the spouses in regard to property acquired during the marriage by the joint efforts of the parties. * * * The community idea is in harmony with the present American conception of marriage, whereby the relation between the spouses is regarded as a partnership, to which both contribute." (Jacobs, *Marital Property,* Encyclopaedia of the Social Sciences, Volume 10, pages 121, 122.)

Prophetically, the biographer and moralist Plutarch, writing in the first Christian century, expresses with antique metaphor the underlying philosophy of community property:

"In the union of the two sexes, each furnishes equally to nature the principles which she fuses and blends together, and the result being common to the two, neither can know or discern what is his and what is the other's. This same principle should govern in marriage with respect to property. It is proper that husband and wife place in common ownership without distinction all that they possess, and that there be nothing belonging in particular to either." (Plutarch, *Préceptes sur le Mariage,* quoted at page 28, Aubéry, *op. cit.,* Note 7, *supra;* our translation. For the French translation, see Aubéry, Appendix, page 9).

Five centuries before Plutarch, the Greek historian of antiquity, recording myths which today seem curious, strikes a modern note. He finds it worthy of remark that among a now forgotten people who venerated justice, the women had equal authority with the men. (Herodotus, Book IV, Melpomene, page 212; Rawlinson's Translation, New York, 1928.)

Economic Origin of the Community Property System.

The community property system is economic in its origin, based upon the social necessity of protecting the wife.[32]

A present-day writer states the case in these terms (de Funiak, Principles of Community Property, Volume 1, Section 11, page 27):

> "The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere 'adornment' of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles. Thus, it may be noticed that among some migratory and nomadic peoples, which lead a hard and dangerous existence, the wife shared with her husband its dangers and

[32]A subsidiary motive may have been to stimulate the wife to industry and economy in the acquisition and preservation of the common heritage. Says the French *légiste* Troplong: "In the countries of the customs, it was the community which was dear to the populations, and this regime was so conformed to national usages, and habitudes, that it was the legal regime of those who married without special agreements. 'Our ancestors,' says Coquille [jurisconsulte, 1523-1603] 'have by custom introduced the community in movables and acquisitions between married people, and it is possible that this has been in order to render the wives more careful to conserve the property of the household, when they knew they had part and profit in it, and finally, that as their souls and bodies are conjoined in excellent union, so their goods are united'."

To these quaintly expressed sentiments of the writer of the 16th, the writer of the 19th century quaintly adds his own approval: "I love this language, I love the ideas which it expresses: this philosophy of equality between the spouses seems to me a great progress." (Our translation; for the original see Appendix, p. 23.)

vicissitudes, she was fully cognizant of the details of and shared in his daily life and labor, she lingered on the edge of the battlefields to succor him from or to help him to despoil his enemies, she was side by side with him on dangerous migrations, and took equal part in his councils; among such races the wife was fully recognized as an equal partner. Such a race was that of the Visigoths and indeed most of the Germanic tribes, including the Angles and Saxons, among all of whom the community system was to be found in varying forms. These Germanic tribes did not have a complex form of society, with gradation of classes and its accompanying privileged or landed aristocracy. Their society was essentially democratic in nature."

In Brissaud, *A History of French Private Law,* page 817, we find this statement:

"The causes which made the wife the partner of the husband are of an economical nature rather than of a moral nature; we can hardly find them in the Christian sentiments of the Middle Ages. * * * In towns, where family possessions are rarely met with, there is nothing to offer an obstacle to its [community's] adoption; the marriage portion of the wife consists in the making of an investment, as would the share of a partner; the benefits resulting from commerce and industry, or acquests which are realized because of them, are shared, because the woman, owing to her fortune or her activity, contributes to their production. Community is thus the matrimonial system of the merchants. In the country the land does not belong to the peasant, but to the lord; the possessions of people of small power are reduced to movables, which, because of their very nature, are hardly to be distinguished from one another; they were declared to be common to the two spouses. The

community is thus the system of the serfs and the commoners. It was more difficult for it to obtain a hold in the class of the nobility; the share brought by the wife was there, in fact, ordinarily very small (unless she were the heiress of a fief); she would be contented with her dower. * * *"

In Huebner's *History of Germanic Private Law*, page 630, the author points out that in Northern Germany the old idea of family-property ("Familienvermögen") remained vital among large masses of the rural population, tending to prevent the union of the property, particularly lands, which daughters took with them into the marriage, and that such family lands, in the event of the daughter's death without children, reverted to her family. Continuing, the author says, page 631:

"* * * It was because of this conservative attitude of mind that no necessity was felt, under the legal systems now in question, of giving the wife rights in her husband's property.

"On the other hand, in those regions and among those classes of the population where the chief part of the marital property did not consist of landed possessions inherited through generations, but of acquests, a tendency prevailed to develop an intimate fusion of the property of the two parties into a more or less comprehensive community of goods. Already in the Frankish period the acquests had caused the abandonment, in some legal systems, of the system of separate estates. That they played such a part can be readily understood. For 'where the property is constituted, changed, and enlarged, by the activity and labor of the parties, the fusion of the wife's property with the estate of her husband is materially facilitated.' [Heusler, 'Institutionen', II, 304.]"

The Community System Is Appropriate to a Democratic Society.

Not only is the community system economic in origin; it is the system appropriate to a democratic society such as our own, or that of our Anglo-Saxon ancestors (see *de Funiak*, page 55, *supra*).

Aubéry says of a society in which community was conspicuously absent:

> "The absence of community of goods in England appears to have a cause of political order. It is probably a consequence of the institution of territorial aristocracy. The effort has been to concentrate the great fortunes and prevent their breaking up." (Our translation. For the original, see Appendix, p. 11.)

The English historians Pollock and Maitland confirm this. See excerpt quoted page 11, *supra*, from their History of English Law, 2d ed., Vol. 2, page 402.

Origins of the Common Law System.

The English system based upon "the law for the great," to which Congress now says all the states of the Union must turn or suffer an unequal burden of taxation, is feudal in origin (Pollock & Maitland, Volume 2, page 419; Buckstaff, *op. cit., supra*, page 12), growing out of the assumed necessity of the maintenance of a landed aristocracy and the perpetuation of great fortunes. The particular institution, that of dower, which the common law offered in place of community rights, was a privilege grudgingly allowed by international brigands to the daughters of a conquered people. The distinguished French historian Aubéry (*op. cit., supra*, note 7) makes clear the origin of the vaunted common law system of marital property rights. After stating that in Normandy not only was

the community system of common right non-existent, but community by agreement was actually prohibited, he continues:

> "Such a singularity is explained by considerations drawn from the organization of the family in the province of Normandy. The wife had there a very humble status, the husband extended powers. The Normans, who joined a proverbial avarice to an insatiable cupidity, not having been able to link with their fortunes across the seas the women of their country of origin, united with those of the region they had conquered. These former pirates showed little regard for their wives, considering them as strangers, inferior persons." (Our translation of a portion of excerpt quoted in Appendix, p. 10.)

Continuing, he quotes an earlier writer, Marcadé:

> "Ferocious soldiers, avid conquerors, the first Normans, in seizing Neustria and taking the women of the vanquished, following the example of the first Romans, must have seen in their marriage a relationship of master and slave rather than an association giving common rights to the persons concerned."

The Normans, carrying their system of family laws to England with William the Conqueror in 1066, made impossible the adoption of the community system in that country, thereby depriving the Anglo-Saxon race of an ancient heritage. We proceed to the documentation of this statement, which has a definite relevance to the issue now before the Court.

Neither of the standard English historical texts is very definite upon the effect of the Norman conquest respecting the law of marital property. Holdsworth (*op. cit.* note

10, *supra*) says, Volume 1, page 29, that "The conquest was disastrous in its results to the poorer classes."[33]

Pollock and Maitland, 2d ed., Volume I, page 79, say: "The Norman Conquest is a catastrophe which determined the whole future history of English law."

From another source we obtain an idea as to the extent of the catastrophe of which the historians speak. Florence G. Buckstaff, at page 241 *et seq.* of the monograph referred to page 12, *supra*, deals with the law relating to marital property during the period from the reign of Aethelbert (after the coming of Augustine[33.1] into England (A.D. 597)) to the Norman Conquest. On page 245 the author says,

> "Community of property.—When there were children of a marriage the morning-gift was superseded, as in Westphalia, by an equal share of the family property. * * *"[34]

Discussing the rights of married women during the Anglo-Norman period, the author says, page 250,

> "We have seen the general position of Anglo-Saxon women; *that they were equal partners in marriage*, and as widows were independent citizens." (Emphasis supplied.)

Page 251:

> "If now we pass over the first century after the Norman Conquest and inquire what the property rights of women were in the reign of Henry II. (1154-89), we shall find that a great change has come

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[33]On the effect generally of the Norman conquest, see Volume 1, page 24 *et seq.*; see also Volume 2, page 12.

[33.1]Or Austin; first Archbishop of Canterbury.

[34]In a footnote, page 245, the author quotes from Young, "Essays in Anglo-Saxon Law," edited by Henry Adams, page 134: "The legal dower of Anglo-Saxon law included half the husband's property, real and personal."

about. We are fortunately able to determine exactly the legal position of women at the later time. We have a description of the laws and customs of England (*Tractatus de legibus et consuetudinibus regni Angliae*) which is ascribed to Ranulf Glanvill, the great lawyer and justiciar of the latter part of Henry the Second's reign. We will first ascertain the property rights of married women according to Glanvill, and then work back into the years between Glanvill and the conquest with a view to tracing the origin of the vast change we shall find. If we succeed in any degree in accounting for the state of things described in Glanvill, we shall also account for the origin of the disabilities of women in the later Common Law of England, for the rules laid down by Glanvill continued in force, with few modifications, until our own day.

"The community of property known to the Anglo-Saxons has disappeared in Glanvill's day and the morning-gift or *dos ad ostium ecclesiae*, the dower of common law, has taken its place. * * * The widow's share, then, was the dower of one-third the real estate of which her husband was seized at the time of the marriage and one-third of his personal property in addition. The dower interest was only for life, and was restricted to a third of what her husband possessed when she married him, no matter how much he had acquired afterward."

Page 256:

"We cannot tell precisely when the old customs came to an end and the new ones took their place. The modification must have been a gradual one, extending over all the years from William the Conqueror to Glanvill. There were struggles on the part of the Anglo-Saxons to keep their ancient ways; and they met with a promise of success from Henry I.; but as the military tenure of land increased, the

powers and rights of women diminished. They could not perform military service. The feudal lord received great profits from his wards and it was to his interest that the children should have a larger share of a man's property than a widow. Again, the husband often had to perform feudal services for *maritagium* of his wife; hence he had certain rights in the *maritagium*. In such ways the feudal system tended to curtail the property rights of married women and widows. Whether the same results would have come about as a result of indigenous feudal tendencies had the Norman Conquest never taken place, may be doubted. That some of the provisions found in Glanvill were of Norman origin seems to me extremely probable."

After summarizing the rights of women under the law of Normandy as set forth in the *Tres-ancien Coutumier* (about 1200 A.D.), the author says, page 258:

"When we compare the provisions in Glanvill on dower and so forth with the *Tres-ancien Coutumier*, we find them sufficiently similar to warrant the inference *that it was largely Norman influence which brought about the change from Anglo-Saxon law of communtiy of property to the common law of dower.*" (Emphasis supplied.)

Page 259:

"The Norman customs of dower probably became somewhat general in England in the middle of the 12th century, but, as Digby says, in the county courts and courts of the lords of manors the variety of customs was so great that Glanvill declined to attempt a statement of them. * * *"

On page 263 the author says:

"It is perhaps not strange that the 12th century principles should have lasted in England until the

19th, but it seems strange that the Americans, who laid aside many of the feudal customs, including primogeniture, as mediaeval provisions out of place in a republic, should have kept the provisions of the Common Law regarding women apparently without question."

Through the researches of the French and the American scholar, confirmed in their general points of view by the leading English historians in so far as they deal with this subject matter, we are enabled to trace the decline and extinction of the Anglo-Saxon community laws or customs, and their replacement by an imported system, an "alien intruder,"[34.1] sponsored by "nobles" and based upon "the law for the great." Looking backward some eleven hundred years, we trace the origins of the common law system to the fact that Scandinavian pirates, descending on the coasts of France, adapted to their use a code of marital property laws deemed appropriate to the daughters of the vanquished.[35] Through the conquest of England two hundred years later, the Normans imposed this law and their own particular concepts of what is appropriate for a feudal society upon the great English people. Now, by ironic coincidence, when the people that walked in the darkness of tyranny have seen the great light of liberty, this Court is asked to fasten upon the people of the United States a system of marital property rights originating in the low regard of the conqueror for the conquered, in its essence, as the French historian says, upon the relationship of master and slave.

[34.1] *Cf.* Paul, Federal Estate and Gift Taxation, Section 1.09, referred to page 6, *supra.*

[35] It seems probable that Scandinavian women were the beneficiaries even then of a form of community. See Pollock & Maitland, Vol. II, page 402, quoted in Appendix, page 19.

Present Status of Women Under Common Law Systems.

We concede that the old laws have been relaxed. Marriage is no longer legalized brigandage; it no longer robs a woman of property she already owns, as in good King George's glorious days. Women are no longer subject to all the disabilities they suffered at common law. Minor benefits—homestead, exempt property, widow's allowance—have been granted to them both in non-community and in community states (3 Vernier, *American Family Laws*, Section 228). Dower they retain in no community property state, but in some form, in twenty-four others (Vernier, Section 189). Regarding this venerable institution the competent scholar just mentioned, commenting on well-meant efforts at improvement in it, says (*op. cit.*, Section 188):

> "The most pronounced reaction of the writer after having examined the statutes in this field is a feeling of disgust for the slipshod methods of lawmakers. * * * The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodge-podge. In no field is there more evidence of haphazard, fragmentary legislation; and, in most jurisdictions, no field is more deserving of a complete renovation."

And again (Section 188):

> "It [dower] is no longer applicable to modern property conditions or to the present status of husband and wife; and the widespread statutory changes evidence the fact that legislatures have recognized its inappropriateness. The mistake of the majority of jurisdictions has been the building of new statutory schemes upon the foundation of dower."

Some thirty-three states have purported to give the wife "dower," that is, a statutory share, in the husband's personal property (Vernier, *op. cit.*, Section 189) including, it is assumed, property acquired during the marriage, all the latter being attributed to the husband. To protect these minimum and varying rights, grudgingly conceded, a wife is given—not ownership, or the power of disposal at her own death, as in the community property states—but the power to elect against her husband's will if he fails to accord to her the minimum which the law says he must give her.

What is this statutory amelioration of the common law, so tardy in appearance, worth? Very little, we submit. From a cloud of witnesses we summon the highest courts of three states, each among the first in population and wealth, each renowned as the seat of a mature and a progressive civilization—typical, therefore, of the best the common law has to offer.[36] First, the Supreme Judicial Court of Massachusetts:

> "In this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions, G.L. (Ter. ed.) c. 190, Secs. 1, 2, under his will or by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her." (*Kerwin v. Donaghy*, ... Mass. ....., 59 N.E. 2d 299, 306 (1945).)

Next, the Supreme Court of Pennsylvania:

> "It is the settled law of this state that a man may do what he pleases with his personal estate during his

[36] In fact, it appears from Vernier, Section 188, page 348, that the New York law on this subject constitutes one of the best of the statutory revisions.

life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then only, do the rights of his wife attach to his personal estate." (*Lines v. Lines,* 142 Pa. 149, 165, 21 A. 809, quoted with approval in *Beirne v. Continental Equitable Title & Trust Co.,* 307 Pa. 570, 161 A. 721 (1932).[37]

Finally, the New York Court of Appeals:

"Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory."

Further, quoting from a Pennsylvania case:

" 'The "good faith" required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property. It is, therefore, apparent that the fraudulent intent which will defeat a gift inter vivos can-

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[37]See also *Benkart v. Commonwealth Trust Co.,* 269 Pa. 257, 259, 112 A. 62 (1920), "It is the settled law of this State, as was the common law, that during his life a man may dispose of his personal estate by voluntary gift or otherwise as he pleases, and it is not a fraud upon the rights of his widow or children [citing authorities]. This power arises from the fact that he is the absolute owner, and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life his wife and children have no vested interest in his personal estate, and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death. * * * If the gift is absolute and accompanied by a transfer of possession with intent to divest the donor of his ownership, although the obvious effect is to defeat the wife's or children's succession to the property at the donor's death, it is not fraudulent and therefore invalid."

The rule of the *Benkart* case is referred to with approval by the New York Court of Appeals in *Krause v. Krause,* 285 N.Y. 27, 32, 32 N.E. 2d 779, 780 (1941).

> not be predicated of the husband's intent to deprive the wife of her distributive * * * share as widow.'" (*Newman v. Dore*, 275 N.Y. 371, 379, 9 N.E. 2d 966, 112 A.L.R. 643 (1937).)

Referring to the feebly forcible efforts to protect the wife's interests reflected in the statutes giving "dower" rights in personalty, Vernier (*op. cit.*, Section 189), after a survey of the field, says:

> "It will be observed that, in general, the wife has no protected inchoate interest in the husband's personal property similar to her inchoate dower in his lands. She shares only in such property as he may die owning."

The community property states do not favor the view that a man "may beggar * *, * his family," by gifts of marital property inter vivos, to strangers, or to anyone. Beside the "modern" common law rule enunciated by the courts of three leading states, we venture to place the community property rule, as stated in a California case:

> "The gift of community property by the husband without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband * * *, and after his death may be set [aside] as to one-half thereof * * *." (*Ballinger v. Ballinger*, 9 Cal. 2d 330, 334, 70 P. 2d 629 1937).)

And as stated in a Washington case (referred to and quoted, in part, page 18, *supra*):

> "Now, a wife's rights in family personalty are not of the contingent sort, like dower or survivorship, but a present estate. True, by our statute the husband is made manager, with full power to sell and dispose of this. But it does not follow that he can give it away. He is, so to speak, only the head of a

> firm. The personal property is just as much hers as his. * * * Under our law she has helped to create it as much as he. Consequently the idea is not to be tolerated that a husband can give a mistress stocks or bonds or precious stones out of the family money." (*Marston v. Rue*, 92 Wash. 129, 159 P. 111.)

The Washington court in *Occidental Life v. Powers*, 192 Wash. 475, 75 P. 2d 27, 114 A.L.R. 531, after referring to earlier Washington cases including *Marston v. Rue*, says:

> "The substance of these decisions is: * * * that a husband does not have the power to make substantial gifts of community personal property without the consent of his wife.[38]

The plain fact is that except for the wife's retention of ownership of her own separate property—a point we are not concerned with here—the common law states are

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[38]A rule somewhat more lenient than that announced in the above cited California and Washington cases apparently prevails in some community property states, in respect of gifts by the husband. See de Funiak, Section 122, stating that "moderate gifts of the community property where there is no intent to injure or defraud the wife and the amounts of the gifts are not unreasonable in any way so as to be in prejudice of her rights" are allowed in some states. Obviously this stops far short of the common law rule under which the husband can "beggar" his family or give away marital property, without limit, for the very purpose of depriving the wife of her right of inheritance. It is doubtful whether the rule stated goes far beyond the *de minimis* exception recognized by the Washington Court in *Marston v. Rue, supra.*

Regarding de Funiak, the caveat should be noted that the Louisiana cases cited by him in Section 122 (see particularly *Thompson v. Societe Catholique*, 157 La. 875, 103 So. 247 (1925)), antedate the 1926 amendment to Section 2404 of the Civil Code, adding the significant clause: "A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor."

still living in pre-Revolutionary times in so far as property acquired by the joint labor and sacrifice of the spouses is concerned. Whatever its statutory ameliorations, the common law still treats the wife as an inferior, not as a partner or a contributor of services having economic worth. Observing the discrimination to which the common law still subjects women; the economic insecurity with which it still holds them in bondage; the right of disposition of property acquired through common enterprise which it parsimoniously withholds—we may paraphrase, but with irony, the observation already quoted (p. 9, *supra*) of a learned commentator whose admiration seems to have been easily evoked: "So great a favorite is the female sex of the laws" of the United States!

The Alternatives Presented.

Fundamentally, the question is whether the law of the Normans shall prevail. To their avarice and cupidity, of which the French historian speaks (*supra*, p. 58), and to which the common law states are indebted for their system of marital property rights, Congress has given countenance and authority in certifying as the preferable, indeed as the exclusive system, that one which says in effect that all property acquired after marriage is acquired by the husband "through his own efforts," and "is regarded as belonging entirely to the husband." In effect, Congress has said that as to marital property acquired through their labor and sacrifice, women have, and can be given, no rights which the laws of the United States are bound to respect, thus giving practical application as a principle to a statement made by this Court as a matter of historic fact, affecting other members of the human race, likewise the objects of immemorial injustice (*Dred Scott v. Sandford*, 19 How. 393, 407, 15 L. ed. 691).

The present cases present on the one side the property system favored by moralists and sages, a heritage of the great free peoples, other than Britons, who were deprived of it through no fault of their own; on the other, that inherited from Scandinavian brigands, sanctified by custom until its crudities have become obscure. This Court now has the opportunity to say whether the older and more civilized institution can continue to exist in competition with a system based on the primitive common law concept that women are inferior beings, entitled only to a subordinate place in the social order.[38.1] At the risk of repetition, we say that Congress has in terms approved this concept when it says that the wife is treated in community property states *as if* she were a part owner, by this derogatory term necessarily implying that the attribution of ownership to the wife must rest on courtesy or fiction, not on the economic worth or value of her contribution.

Without disparagement of this Court's record in any period of history, it may be said of its decisions in recent years that they uphold liberty, and that they are consistent with the ideal of social progress. Complete documentation of this statement would lead too far afield, but we glance in passing at this luminous record,[39] of which

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[38.1] Compare the following statement by a French commentator concerning a marital property regime fully as favorable to women as the common law system: "The above, then, are the merits of the dotal regime according to the views of its defenders. Superiority of man, inferiority of woman, a conserving protection given to her weakness, all the philosophy of this regime is in these three ideas." (Troplong, *op. cit., supra,* Appendix page 23.)

[39] *Social legislation: West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L. ed. 703 (1937).

Civil rights: Ex parte Endo, 323 U.S. 283, 89 L. ed. Adv. Ops. 219 (1944).

Religious freedom: Follett v. *McCormick,* 321 U.S. 573, 88 L. ed. 938 (1944; municipal ordinance held invalid); *Jamison*

the history of free institutions reveals no parallel in a comparable period of time. These decisions recognize that "constitutions are vehicles of life."[40] The tendency, nascent in 1916, which a present Justice of this Court then noted, to place emphasis in dealing with legislation affecting industry, upon "the affirmative enhancement of the

v. Texas, 318 U.S. 413, 87 L. ed. 869 (1943; similar); *Largent v. Texas*, 318 U.S. 418, 87 L. ed. 873 (1943; similar); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. ed. 1628 (1943; ordinance of Board of Education, enacted pursuant to state statute held invalid); *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. ed. 1213 (1940; Connecticut statute held invalid).

Free Speech: Taylor v. Mississippi, 319 U.S. 583, 87 L. ed. 1600 (1943; Mississippi statute directed against alleged subversive doctrines held invalid); *Herndon v. Lowry*, 301 U.S. 242, 81 L. ed. 1066 (1937; Georgia statute held invalid); *De Jonge v. Oregon*, 299 U.S. 353, 81 L. ed. 278 (1937; Oregon statute held invalid); *Stromberg v. California*, 283 U.S. 359, 75 L. ed. 1117 (1931; California statute held invalid); *Thomas v. Collins*, 89 L. ed. Adv. Ops. 340 (1945; Texas statute held invalid); *Thornhill v. Alabama*, 310 U.S. 88, 84 L. ed. 1093 (1940; picketing case; Alabama statute held invalid); *Carlson v. California*, 310 U.S. 106, 84 L. ed. 1104 (1940; county ordinance against picketing held invalid); *American Federation of Labor v. Swing*, 312 U.S. 321, 85 L. ed. 855 (1941; common law policy of Illinois against picketing); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 83 L. ed. 1423 (1939; municipal ordinance interfering with free speech and lawful assembly).

Free Press: Lovell v. City of Griffin, 303 U.S. 444, 82 L. ed. 949 (1938; handbills; city ordinance held invalid); *Schneider v. Town of Irvington*, 308 U.S. 147, 84 L. ed. 155 (1939; similar); *Bridges v. California and Times-Mirror Co. v. Superior Court*, 314 U.S. 252, 86 L. ed. 192 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L. ed. 660 (1936; Louisiana statute taxing advertising in certain publications held invalid).

Right to fair trial: Powell v. Alabama, 287 U.S. 45, 77 L. ed. 158 (1932); *White v. Texas*, 310 U.S. 530, 83 L. ed. 1342 (1940); *Brown v. Mississippi*, 297 U.S. 278, 80 L. ed. 682 (1936); *Smith v. O'Grady*, 312 U.S. 329, 85 L. ed. 859 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143, 88 L. ed. 1192 (1944); *Rice v. Olson*, 89 L. ed. Adv. Ops. 903 (1945); *Williams v. Kaiser*, 89 L. ed. Adv. Ops. 362 (1945).

[40] Woodrow Wilson, The Law and the Facts, 5 Am. Pol. Sc. Rev. 1, at 10 (1911).

human values of the whole community,"[41] has been extended to infuse new vigor and authority into constitutional guaranties, particularly those having to do with individual liberty. In so doing, this Court, firm in according respect to legislative enactments, has nevertheless, in numerous cases, freely employed its constitutional prerogative to declare invalid legislation found not to be in conformity with the supreme law. Whatever affects the rights of the states to regulate their internal economy affects the individual citizen as directly as did the laws justly complained of in the cases to which we have referred.[42]

Consistent with the idea of liberty is the community concept that the condition of equality into which the Declaration of Independence says all men are born, applies both to men and women. Neither equality nor freedom can exist where there is economic servitude; they cannot exist where property acquired through the joint efforts of spouses "is regarded as belonging entirely to the husband" (House Committee Report, *supra*, p. 5); nor where the tax laws discriminate between the spouses.

At a time when, not only in the homes of the nation, but in its factories and even in its services auxiliary to the military and naval power, women have been and are doing their full share to keep the world a decent place for civilized men to live in, an attempt by Congress, invading state authority, to say that no state can confer property rights on women which Congress is bound to

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[41]Mr. Justice Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 Harv. L.R. 353 (1916).

[42]See cases cited, Note 39.

respect, seems particularly lacking in grace and timeliness. This Court, we respectfully submit, has bound itself by no precedents which might prove embarrassing to it in reaching a result consonant with the ideal of social justice—in fact, as we have pointed out (see p. 18, *supra*), the Court's own decisions fully recognize every principle which the community property states need to establish in order to prevail.[49]

That the Court is given the opportunity by its decision to uphold an enlightened and progressive standard constitutes, we believe, no source of embarrassment to the cause of the community property states if, as so often occurs, the question becomes, in the Court's opinion, one where a line must be drawn (*Harrison v. Schaffner*, 312 U.S. 579, 85 L. ed. 1055 (1941); *Irwin v. Gavit*, 268 U.S. 161, 168, 69 L. ed. 897 (1925)).

Conclusion.

In conclusion, we revert to the Congressional concept mentioned at the beginning (p. 5, *supra*), to the effect that in non-community-property states, property acquired by the husband after marriage "through his own efforts" is regarded as belonging to the husband. Translated, this means that the husband is the beneficiary of his wife's "efforts" as well as of his own. Manifestly, such a system has its advantages—to the male population. Since

[49]There is no "long period of accommodations to an older decision," requiring the Court "to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." *Helvering v. Griffiths*, 318 U.S. 371, 87 L. ed. 843 (1943); *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 86 L. ed. 100 (1941).

the converts to the community property system have been few, it seems that those advantages are deemed to outweigh certain differences between community and non-community states in respect of taxation. All the states can obtain the advantages, if any, of the community property system by adopting it.[44] The remedy is in their own hands, and the price is willingness to forego the advantages which the common law gives the sex which, if allowance is made for obstinate self-deception, is master only when its opinions are concurred in, and obeying, believes that it commands.[45] In the absence of willingness to pay that price, it comes with ill grace for the non-community states, the majority, through their lawmaking power, to enact legislation impairing the operation of the older and more equitable system.

If Congress can validly enact such legislation, a long step has been taken toward obliteration of the autonomy of the states, and toward Congressional control over their institutions, customs, laws. In passing a measure having

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[44]The writer of the note in 58 Harvard Law Review 742 (May, 1945), to which we have referred (see p. 6, *supra*), recognizing the heavier tax burden on the community under certain conditions, naively suggests that the community property states may achieve tax equality by going over to the common law system. Such a suggestion, proceeding from so respectable a source, emphasizes the social and economic importance of the problem now presented to the Court. Is it not clear that an act of Congress which compels a state to modify its system of property rights in order to escape an unequal tax burden is an interference with that system?

The further statement in the same note that "the wife's interest in property held in a community property regime differs little from her interest in her husband's property at common law," betrays a fundamental misconception of community property.

[45]See *passim*, Aubéry, *op. cit.*, note 7, *supra*, at page 506, quoted Appendix, page 11.

such an effect and tendency, Congress, we submit, has misconceived and exceeeded its authority.

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APPENDIX—List of Authors quoted, in order in which they appear:

APPENDIX.

Huebner, *A History of Germanic Private Law*, Little, Brown and Company (1918), pages 626 and 627:

"*Legal Relations during the Existence of Marriage.* (1) *The ordinary form* of the marital community of property in the folk-laws was that the ownership of the wife's estate, constituted of the portions above indicated, was not in the husband, but in the wife. The husband, however, by virtue of his mundium, held possession of all the wife's property: as a result of the marriage the property of the bride was delivered to him, and he likewise held in his own hand his gifts to the bride. In this manner, the distinct ownership of the property being preserved, but the entire marital estate united in the possession of the husband, the result was that as early as in the folk-laws the original undivided property had been replaced, in the main, by a system of community property. * * *"

After pointing out that, under the earlier law, the husband having received the seisin of the wife's estate, received with it on the one hand the right to take the profits and on the other hand the duty of administration, holding the wife's property as mundium-holder or guardian ('Vormund'), and that the husband could alienate the wife's chattels, while the wife on the other hand could not dispose of anything *inter vivos* with the exception of the paraphernalia, the author goes on to say:

"(2) Some of the legal systems of the Frankish period had already departed from this principle of distinct estates to the extent of recognizing a true legal community as respects so-called *acquests* ('Errungenschaften'),—that is, such property as was acquired by the spouses during marriage, by labor or by juristic act, for value; an idea

also reflected in the dower, which consisted of a fraction of the husband's property. * * *"

In the excerpt first quoted above is a reference to the time of the *folk-laws*. Huebner seems to be not very specific as to what this time was. On page 5 he states that in the earliest times law rested, among the Germanic peoples as elsewhere, upon custom, and that if in primitive times any public statutes were enacted, such instances must have been rare. He continues, pages 5 and 6:

"* * * After the migrations of the Germanic tribes, it is true, the different Germanic racial branches made comprehensive records of their law. But these so-called folk-laws or 'Leges Barbarorum' were, in their original form, essentially written formulations of old customary law. * * * Moreover, the folk-laws were never exhaustive legal records; numerous unwritten rules of customary law remained in authority beside them. Even the Frankish capitularies did not sweep aside the customary law. And for private law the whole legislation of the Frankish period had almost no significance whatever.

"After the disintegration of the Frankish Empire the folk-laws and the capitularies gradually fell into oblivion, until in the 1000s they were completely forgotten. Almost no new statutory law appeared until in the 1200s. * * *"

The Frankish period, mentioned numerous times in Huebner, is from about 500 A.D. to 843. It reached its height under Charlemagne, who was proclaimed Roman emperor in the year 800 and died in 841. In the second excerpt quoted above from page 627, Huebner says that a true legal community had begun to develop during the Frankish period (that is, somewhere between the years 500 and 843).

In the first excerpt quoted above, the term *mundium* is referred to. This is defined on page 619. It seems to come from *Muntherr* and is about the equivalent of *guardian, steward,* or *master.* The subject is also discussed, pages 632 to 634.

On pages 643 and 644 it is stated:

"(2) *The general community of goods.*—As already remarked, many medieval systems of marital property established not simply a limited but a general community of goods. Some of them accomplished this by extending the acquest and chattel community to the entire marital property. This was first done in the Frankish and Westphalian laws, where the requirement that dispositions of land be made by collective hand even under a limited community of goods (*supra,* page 640) had the result of developing a collective ownership of the spouses in those portions, also, of the marital property. In many places, particularly in the cities of Frankish and Bavarian-Austrian territory, statutory recognition of this form of marital estate originated in a custom by which spouses mutually devised their entire property to one another. The general community of goods was first developed in the lowlands of the upper and lower Rhine as far as Holland and Flanders, as well as in Westphalia and Thuringia; from these regions it spread into the lowlands of the Weser, toward Hamburg and Lübeck, Mark Meissen and Mark Brandenburg, Lausitz, Silesia, Prussia, Bohemia, and Moravia. It was also widely prevalent in the regions of the Swabian, Bavarian, and Austrian laws, and was introduced into many cities of Magdeburg law in place of the Saxon paraphernalia. A few legal systems regarded it as arising only when a child was born from the marriage, and as determining upon the death of all children,—

so, for example, the Westphalian-Lübeck law that spread from Soest. This consideration, however, was generally disregarded, following the example of the Frankish law.

"(A) Legal Relations During Marriage.—The general community of goods, in its legal essence, was 'a community in collective hand[a] that fused the entire property of both spouses into one entity, their shares therein being undivided and uncollectible during the continuance of the community.' [*Gierke* in *Holtzendorff-Kohler*, I, 538.] It was distinguished from the limited community of goods by the fact that the community attached by force of law to all property brought into the marriage or later acquired, intimately uniting it in a collective estate belonging equally to both spouses. There existed, therefore, no statutory separate estates; but, on the other hand, there was nothing to prevent the spouses from reserving particular pieces of property, by marriage contract, as separate property. Yet even under this system, which emphasized most decidedly the equality of husband and wife in property rights, the husband was the holder of the mundium and the head of the marital community, and therefore alone entitled to administer and represent it. To be sure, his dispositive power was variously limited in different legal systems. Although he could everywhere dispose independently of the chattels, he was bound in most systems, as regards the lands, to secure the cooperation of his wife; only a few allowed him to act with entire independence as to them also. As for the treatment of obligations, the same principles prevailed as in the case of the limited community of goods. The spouses constituted with respect to the collective property

[a] "Zu gesammter Hand," that is, in joint hands, or common ownership. The German phrase is referred to by Brissaud, page 813. "In collective hand" seems to be an inapt translation.

a community of obligations ('Schuldengemeinschaft'). Obligations binding the collective estate included all obligations assumed by the husband, and such obligations of the wife as were incurred either before her marriage or in transactions within her marital competence. The husband was liable for these obligations of the collective estate with his special estate, also, if such existed; whereas under most legal systems the wife was liable only with the collective property under all circumstances, and could free herself even from this liability, as in the case of a chattel community, by a renunciation made in legal form (above, p. 640)."

On page 647 Huebner traces some of the later developments of the "system of the general community of goods" and shows that it was carried into some of the modern codes, leaving in effect, however, provincial statutes and regulations ("Statuten") which established a general or acquest-community. It is pointed out, however, that other contractual agreements were permitted. The prevalence of this general community of goods is also referred to on page 651.

Brissaud, *A History of French Private Law*, Little, Brown and Company (1912), pages 28 and 29:

"The Middle Ages contrasted *community of possessions* between spouses with the Roman *marriage portion system*. Although under this latter system the wife is no longer subject to the husband's power, still she has absolutely no share in the advantages realized by the husband in the administration of the property forming the marriage portion. The community still places the wife who has her own possessions under the authority of her husband; but the husband cannot have any disposal of the personal belongings or family possessions of his wife;

and, as acquisitions made during the marriage belong to both spouses in common, she receives her share of them when the marriage is dissolved,—a thing which is perfectly equitable when her personal possessions or her labor has contributed, as happens more often than not, to the acquisition of these possessions by the community.

"In England, where the community was never introduced, the evolution of the marriage contract was the same as at Rome. The 'feme covert,' who was absorbed in and annihilated by her husband, resembles the Roman wife 'in manu mariti.' But the civil law was often evaded, and the Law of 1882 (Married Woman's Property Act) sanctioning an emancipation which had already taken place in fact, has given her the free administration and the free disposal of her possessions; she is merely asked to contribute her share to the expenses of the marriage; she is in the same position as a silent partner."

In a note on page 813, the author speaks of

"* * * a Germanic joint ownership, 'zu gesammter Hand'; this not very precise theory would assume that both spouses would have to act 'communi manu'; but as this is only true in exceptional cases, the conception of unity of hands must be brought in ('Einhand'), a thing which overthrows the principle. Cf. the oft-cited passage from *Justus Veracius*, 'Libellus consuet. princip. Bamberg' (1681), 1733, p. 59."

On page 812 the author says:

"The system of common law at the beginning of the feudal period in countries of Customs placed the possessions of the wife under the administration and made them subject to the enjoyment of the husband; one can say that in this sense they were all part of the marriage por-

tion. All the acquests belonged to the husband. The wife, who was strictly subject to the husband's guardianship, only had a right of survivorship (dower, etc.) and the restoration of the share brought by her in immovables, when the marriage came to be dissolved. Under this system, as under that of the community, the possessions of the spouses formed but one mass, which was in the hands of the husband. But it was lacking in the two essential characteristics by which the community system is marked: (a) the transmissibility of the wife's rights to her heirs; by which, if marriage were dissolved by her dying first, her heirs took the share to which she would have had a right if she had survived; (b) during their joint life the spouses are looked upon as joint owners, or as partners with respect to losses and gains."

Note, page 814: "The evolution of the community system is, as we see it, characterized by the affirmation and the more and more energetic protection of the rights of the wife." The author goes on to say, "There are many who interpret it differently," and this idea is developed somewhat at length.

Going back to the origins of community, the author says, page 816:

"* * * It is rarely found mentioned in the twelfth century; the charters of the communes of the North, like that of Laon, 1128, c. 13, speak of a community of acquests between the spouses. In the thirteenth century P. de Fontaines does not seem to make any allusion to it; 'Jostice,' the 'Et. de St. Louis,' the Assizes of Jerusalem, and the Registers of Parliament, are far from being explicit. Beaumanoir is very sparing of details; he, however, affirms in a categorical manner the existence of the conjugal community and presents it as an immemorial

custom, 21, 2: 'Everyone knows that a community is formed by marriage, for as soon as the marriage is performed the property of one and the other becomes common by virtue of the marriage. My views are that the man is a guardian . . .'

Beginning on page 817, the author speaks of the causes which produced the community and directed its evolution, saying that community is the matrimonial system of the merchants (see quotation, page 55, *supra*).

Continuing, page 821, the author says:

"We are led to believe that the community was more frequent originally among the commoners, and that it only became generally accepted among the nobility later on. But we cannot hide from our selves the fact that there is a good deal of uncertainty upon this point. There was no absolute obstacle to the formation of a community among members of the nobility, at least one restricted to movables. The right of survivorship of the Frankish period existed in the case of women of very high rank, as well as women who were free; in various localities it became transformed into a community right. But there are to be found texts from which it clearly follows, or which allow one to assume, that in other localities the wife of the nobleman had no community possessions, and that she was satisfied with her dower and her legal reference-legacy in movables; this is because the old tradition was retained in this matter, as happens often enough in the law of the nobility, the social anatomy of this law being more archaic than that of plebeians; it is also because the exclusion from inheritance, to which all women were formerly subjected, lasted especially in the case of the nobility. Perhaps this peculiarity, better than any other explanation, will account for this remarkable fact:

until 1580 the renunciation of community was only allowed in Paris to a woman of the nobility; in doing this she acted as an heiress rather than as a partner."

Gaëtan Aubéry, *La Communauté de Biens Conjugale*, (Paris, 1911), pages 25 and 26:

"On ne trouve donc dans l'antiquité aucune trace d'une vraie société conjugale de biens gouvernée par le mari. La communauté, qui implique une certaine égalité de droits entre époux, est évidemment incompatible avec la polygamie, quit fait à la femme une situation trés inférieure. * * *"

Page 28:

* * *"Dans le premier siècle qui a suivi la naissance du Christ, paraissent les Préceptes sur le mariage, de Plutarque. Cet ouvrage, véritable trésor de la sagesse antique, élève l'âme et renferme des leçons de haute morale domestique. D'après le célébre moraliste, tout dans le mariage doit être commun, surtout les idées et les principes. 'Dans l'union des deux sexes, dit-il, chacun fournit également à la nature des principes qu'elle mêle et confond ensemble, et, ce qui en résulte étant commun aux deux, nul ne peut connaitre ni discerner ce qui est à lui ou ce qui est à l'autre. Il doit en être de même dans le mariage par rapport aux biens. Il faut que le mari et la femme mettent en commun sans distinction tout ce qu'ils possèdent et qu'il n'y ait rien de particulier pour aucun d'eux.'"

Page 180:

"L'autorité maritale a donc pour fondement, au temps de Beaumanoir, le désir d'introduire la concorde et la stabilité au foyer par l'etablissement d'une direction unique. La femme est, non point une inférieure, mais une associée, qui n'est subordonée au mari que parce qu'il est chef de l'association. * * *"

Aubéry, page 203 (quoting from Molière, *L'Ecole des Femmes* IV, 2 (1663):

Le Notaire "Sais-je pas qu'étant joints on est par la coutume
Communs en meubles, biens, immeubles et conquêts,
A moins que par un acte on n'y renounce exprès?"

Aubéry, pages 239 and 240:

"En Normandie, à la différence de ce qui se passait dans les autres pays du Nord de la France, ou la communauté était d'un usage constant, la stipulation de ce régime était prohibée. Ainsi, d'après la Coutume normande, non seulement il n'existait pas de communauté de droit commun, mais encore toute communauté conventionnelle était interdite. Pourquoi les Normands, qui étaient de la même race primitive que les Francs, n'ont-ils pas admis le système nuptial des pays Coutumieurs? Une telle singularité s'explique par des considérations tirées de l'organisation de la famille dans la province de Normandie. La femme y avait une condition très humble, et le mari des pouvoirs étendus. Les Normands, qui joignaient à une insatiable cupidité une avarice proverbiale, n'ayant pu associer à leurs fortunes à travers les océans les femmes de leur pays d'origine, s'étaient unis à celles de la région qui'ils avaient conquise. Ces anciens pirates montrèrent peu d'égards pour leurs épouses, less considérant comme des étrangères, des personnes inférieures. C'est ce que fait remarquer Marcadé. 'Soldats farouches, conquérants avides, dit-il, less premiers Normands, en s'emparant de la Neustrie et en y prenant les femmes des vaincus, durent, à l'exemple des premiers Romains, voir dans leur mariage un rapport du maitre à l'esclave

plutot qu'une association donnant des droits communs aux personnes.' La femme normande était placée sous une sorte de tutelle perpétuelle; sa personnalité était très effacée. Son mari pouvait la battre,'sauf à ne pas lui crever les yeux et lui briser les bras', disait l'ancienne Coutume normande, rappelée par Basnage. Ses biens se trouvaient également sous la dépendance absolue du mari. Au surplus, le statut normand était pénétré du principe de la conservation des biens dans la famille. D'autres que les héritiers légitimes ne devaient pas être appelés à la succession. Aussi n'accorda-t-on que très tard des droits successoraux à la femme. Cet état de choses ne permettait guère à celle-ci d'obtenir des avantages pecuniaires dan l'association conjugale. Si donc la communauté fut privée de tout droit de cité en Normandie, la cause en était dans les conditions d'existence et les moeurs de ses occupants originaires, qui s'opposaient à ce que régime recut l'accueil qu'il méritait. Tant il est vrai que la système matrimonial d'un peuple est d'autant moins relevé que la condition de la femme y est plus abaissée et s'éloigne davantage des idées de civilisation.' "

Page 382:

"L'absence d'une communauté de biens en Angleterre parait avoir une cause d'ordre politique. C'est vraisemblablement une conséquence de l'institution de l'aristocratie territoriale. On a tenu à concentrer les grandes fortunes et à en empêcher le morcellement."

Page 506:

"On dit que la femme est sacrifiée dans le régime de la communauté. Mais la prééminence légale du mari n'est-elle pas souvent illusoire? C'est une physionomie toujours vivante et vraie que celle du Chrysale de Molière, chef nominal de la communauté, maitre dans la

maison quand Philaminte partage son avis, croyant commander quand il obéit. Cette faiblesse maritale ne se voit-elle pas tous les jours? Que d'épouses habiles laissent à leurs maris l'illusion du gouvernement domestique! * * *"

Page 522:

"* * * En fait, dans tous les ménages ou régnent l'order et l'harmonie, la femme est l'auxiliaire, l'associée du mari, pour les actes saillants de la vie conjugale. Qui contestera son influence parfois silencieuse au sein du foyer? N'est-ce pas elle qui préside ou vaque aux travaux intérieurs, qui s'occupe de l'ordonnance des affaires domestiques, qui lutte contre les milles contrariétées de l'existence familiale, qui courageusement supplée à l'insouciance ou à la paresse du mari en gagnant les moyens d'existence du ménage? 'Tout ce qui a rapport, dit le bon Rollin, au gouvernement intérieur d'une maison: voilà à proprement parler la science des femmes; voilà l'occupation que la Providence leur a assignée comme par préciput, et pour laquelle elle leur a donné plus de talent qu'aux hommes.' On a souvent cité ces vers de Molière, qui définissent si clairement l'économie domestique et attribuent à la compagne de l'homme son vrai role dans la maison:

'Former aux bonnes moeurs l'esprit de ses enfants,
Faire aller son ménage, avoir l'oeil sur ses gens,
Et régler la dépense avec économie,
Doit être son étude et sa philosophie.'
[*Les Femmes Savantes*, Act II, Scene 7.]

"On ne saurait mieux s'exprimer ni rencontrer plus juste. N'est-il donc pas équitable, en retour de cette mis-

sion active, que la femme soit admise à partager avec son mari les acqêts réalisés durant l'union?"

Page 553:

"A en juger pas les efforts des divers législateurs, on voit que l'humanité marche dans la voie du progrès social et de l'amélioration de la condition de la femme. De nos jours, dans les ménages, on trouve moins de misères morales ou physiques que par le passé."

The following is our translation of the excerpts from Aubéry quoted above.

Pages 25 and 26—This excerpt is translated, Note 14, *supra.*

Page 28:

In the first century following the birth of Christ appeared Plutarch's Precepts on Marriage. This work, a veritable treasure of ancient wisdom, elevates the soul and contains lessons of high domestic morality. According to the celebrated moralist, everything in marriage ought to be common, ideas and principles above all. [The remainder of this excerpt is translated page 53, *supra.*]

Page 180—This excerpt is quoted Note 7, *supra.*

Page 203—Quotation from Moliere, l'Ecole des Femmes IV, 2 (1663). This excerpt is translated, page 10, *supra.*

Pages 239 and 240:

In Normandy, differing from that which took place in the other countries of the north of France, where the community was in constant usage, contracting for this regime was prohibited. Thus, according to the Norman custom, not only community of common right did not exist, but even the conventional community was interdicted. Why did the Normans, who were of the same primitive race as the Franks, not admit the nuptial system of the countries

of the customs? [Here follows the excerpt quoted page 58, *supra.*] Continuing: The Norman wife was placed under a sort of perpetual tutelage. Her personality was very much effaced. Her husband could punish her "except that he could not put out her eyes or break her arms," said the ancient Norman Custom, recalled by Basnage. Her property was placed equally under the absolute power of the husband. Moreover, the Norman statute was saturated with the principle of conservation of property within the family. People other than legitimate heirs could not be called to the succession. Likewise, rights of succession were not accorded to the wife until very late. This state of affairs hardly permitted her to obtain pecuniary advantages in the conjugal association. If then the community was deprived of all common right in Normandy, the cause was in the conditions of existence and the customs of its original occupants, who were opposed to the regime receiving the reception that it merited. So much is it true that the matrimonial system of a people is the less advanced as the condition of woman is more abased and becomes more remote from the ideas of civilization.'

Page 382—This excerpt is quoted page 57, *supra.*

Page 506:

It is said that the wife is sacrificed in the community regime. But is not the legal preeminence of the husband often illusory? A picture always living and true is that of Chrysale in Moliere, nominal head of the community, master in the house when Philaminte shares his opinions, believing himself to command when he obeys. Is not this marital infirmity seen every day? 'How many clever women leave to their husbands the illusion of being in authority] [The Molière reference is to *Les Femmes Savantes.*]

Page 522:

In fact, in all the households where order and harmony reign, the wife is the auxiliary, the associate of her husband, for the important acts of the conjugal life. Who will dispute her influence, sometimes silent, at the fireside? Is it not she who presides over or applies herself to interior labors, who occupies herself with ordering domestic affairs, who strives against the thousand contrarieties of family existence, who courageously supplies what is lacking due to the carelessness or the laziness of the husband in gaining the means of existence of the household? "All that which has relation," said the good Rollin, "to the interior government of a household: that, properly speaking, is the science of women; that is the occupation which Providence has assigned to them as a preferred gift, and for which it has given them more talent than it has given to men."

These verses of Molière which define so clearly the domestic economy and attribute to the companion of man her true role in the household have been often cited:

To conform to good customs the character of her children,

To conduct the household, keep an eye on the servants,

And control expense with economy,

Ought to be her study and her philosophy.

[*Les Femmes Savantes,* Act II, Scene 7.]

It would be difficult to express the thought more exactly.

Pages 522, 553—The remaining excerpts are translated page 52, *supra.*

Nouveau Commentaire sur La Coutume de Paris, de Ferriere (Paris, 1770), Vol. 2, page 1:

"La communauté de biens qui fait la matière de ce titre,

est une société qui se contracte en pays coutumier, entre les futurs conjoints par mariage pour les biens meubles & conquêts immeubles faits durant & constant le mariage.

"Cette société a lieu par toute la France coutumiere, excepté dans les coutumes de Normandie, de Reims & d'Auvergne."

Pages 3 and 4:

Article CCXX

"De quels biens & de quel jour se contracte la communauté.

"Hommes & femmes conjoints ensemble par mariage, sont communs en biens meubles, & conquêts immeubles faits durant & constant ledit mariage. Et commence la communauté du jour des épousailles & bénédiction nuptiale.

"Cet article etoit le 110 de l'ancienne coutume.

* * * * * * * *

"En biens meubles & conquêts immeubles.

"Cet article nous marque quels biens tombent dans la communauté de biens; savoir tous les meubles des conjoints; c'est-a-dire, tous les meubles & effets mobiliers de quelque nature & qualité qu'ils soient, & à quelque somme qu'ils puissent monter, par la raison que c'est la qualité de la chose qui les fait tomber dans cette communauté.

"Les meubles, sans distinction, tombent dans cette communauté, soit ceux qu'ils avoient lors de leur mariage, ou ceux qui leur sont échus ou à l'un d'eux pendant le mariage, sans distinguer de quel coté ou par quel moyen ils leur sont échus par succession ou donation en ligne directe, ou par succession en collatérale, ou par donation, legs ou autrement, il n'importe."

The following is our translation of the excerpts from de Ferriere, quoted above.

Page 1:

The community of goods which constitutes the matter of this title is a society which is contracted in a country of the customs between those joined by marriage, for movable property and immovable acquests made during the marriage.

This society is found in all France except in the customs of Normandy, of Reims and d'Auvergne.

Pages 3 and 4:

Article CCXX.

Of what goods and as of what day does the community take effect.

Men and women joined by marriage are common in movable property, and in immovable acquests made during the marriage. And the community commences on the day of the marriage.

This article was number 110 of the ancient custom.

* * * * * * * * * *

In movable goods and immovable property acquired.

This article indicates what properties fall in the community of goods; to wit, all the movable property of the spouses, that is to say, all personal property and effects of whatever nature and quality, regardless of what sum they may amount to, the reason being that it is the quality of the thing which makes them fall into the community.

Movables without distinction fall into the community, whether they are things that they [the spouses] had at the time of their marriage or those which have come to the one or the other during the marriage, without distinguishing from which side or through what means they have come, through succession or donation in a direct line, or through collateral succession, or through testamentary gift or otherwise, it makes no difference.

Blackstone's Commentaries, Book II, Cooley's Second Edition (Chicago, 1872), page *433, (referred to, Note 10, *supra*):

"VI. A sixth method of acquiring property in goods and chattels is by *marriage;* whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and with the same powers, as the wife, when sole, had over them.

"This depends entirely on the notion of an unity of person between the husband and the wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a *real* estate, he only gains a title to the rents and profits during coverture; for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in *chattel interests,* the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain in the wife, or to her representatives, after the coverture is determined."

In Book I, page *444, after pointing out various limitations upon the wife's authority to perform legal acts, and that she was so far regarded as inferior to the husband that under the old law, moderated to some extent at the time Blackstone wrote, the husband "might give his wife moderate correction" (a privilege, he states, which "the

lower rank of people, who were always fond of the old common law, still claim and exert * * *), the author observes with apparent seriousness:

"These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England."

Pollock and Maitland, *The History of English Law*, Second Edition, Volume II, pages 402 and 403:

"Our own law at an early time took a decisive step. It rejected the idea of community. So did its sister the law of Normandy, differing in this respect from almost every custom of the northern half of France. To explain this by any ethnical theory would be difficult. We can not put it down to the Norsemen, for Scandinavian law in its own home often came to a doctrine of community. We can not say that in this instance a Saxon element successfully resisted the invasion of Norse and Frankish ideas, for thus we should not account for the law of Normandy. * * *"

"Misdoubting the possibility of ethnical explanations, we must, if we would discuss the leading peculiarities of our insular law, keep a few great facts before our minds. In the first place, we have to remember that about the year 1200 our property law was cut in twain. The whole province of succession to movables was made over to the tribunals of the church. In the second place, we are told that in France the system of community first became definite in the lower strata of society; there was community of goods between the *roturier* and his wife while as yet there was none among the gentry. We have often had occasion to remark that here in England the law for the great becomes the law for all. As we shall see below, the

one great middle-class custom that our common law spared, the custom of the Kentish gavelkinders, might with some ease have been pictured as a system of community. But in England, with its centralized justice, the habits of the great folk are more important than the habits of the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property, and this was first evolved among the rich by means of marriage settlements."

On page 418 the authors speak of the gavelkind custom of Kent, under which the surviving spouse enjoyed so long as he or she remained single one-half of the land of the dead spouse, this right, whether enjoyed by the widow or widower, bearing the name of "free bench," going on to say, page 419, that in addition to this right the survivor very possibly was entitled to enjoy a possible guardianship over the other half of the land.

"* * * The law of socage land gives the wardship of the infant heirs of the dead spouse to the surviving spouse. In Kent it must have been common enough to see a widower or a widow enjoying the whole of the land left behind by the dead wife or husband.

"Probably it is upon some such scheme as this that feudalism has played. Here in England it destroys the equality between husband and wife. On the husband's death, the widow is allowed by way of dower one-third of his land at the utmost. * * *"

On page 432 it is said, quoting from authorities which the authors cite in the notes,

"And so he [the lay lawyer] said boldly that the whole mass belonged to the husband. 'It is adjudged that the wife has nothing of her own while her husband lives, and

can make no purchase with money of her own.' [Placit. Abbrev. p. 41, Northampton (4 John).] 'She had and could have no chattel of her own while her husband lived.' [Ibid. p. 96, Norf.] 'Whatsoever is the wife's is the husband's, and the converse is not true.' [Birtton, i. 227.] 'The wife has no property in chattels during the life of her husband.' [Y.B. 32-3 Edw. I, p. 186.] 'This demand supposes that the property in a chattel may be in the wife during the life of her husband, which the law does not allow.' [Y.B. 33-5 Edw. I. p. 313.]"

Schmidt, *The Civil Law of Spain and Mexico,* (New Orleans, 1851), page 12 (Book I, Title i, Ch. 4, Sec. 1):

"COMMUNITY OF GOODS.

"Art. 43. The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced, in the manner prescribed in Section 3.

"Art. 44. To this community belong:

1. All the property of whatever nature which the spouses acquire by their own labor and industry.

2. The fruits and income of the individual property of the husband and wife.

3. Whatever the husband does gain by the exercise of a profession or office, e.g. as judge, lawyer, physician, &c.

4. The gains from the money of spouses, although the capital is the separate property of one of them.

"Art. 45. The property owned by either husband or wife before marriage does not belong to the community, nor the profits of the same, already due, although collected after the marriage.

"Art 46. Property acquired by either after marriage by a gratuitous title, such as inheritance, donation, or bequest, does not belong to the community.

"Art. 47. Nor does property acquired in exchange for other property belonging to one of them, nor that acquired by the produce of the sale of property belonging exclusively to one of the spouses.

"Art. 48. Money, expended in improving property belonging to one of the spouses, belongs to the community, but gives the other no claims to the property itself.

"Art. 49. Husband and wife are entitled to an equal share in the community, although one of them should, at the time of marriage, have been without any means. At the same time both are liable, in equal proportion, for the losses and debts incurred during its existence."

M. Troplong, *Du Contrat de Mariage,* being part of a larger work; *Droit Civil Explique,* Third Edition (Paris, 1857), pages 51 to 55, inclusive:

"35. Maintenant revenons sur cette idée, que la communauté rentre dans les conditions naturelles du mariage; demandons-nous si le Code civil a fait sagement, en l'élevant à l'état de régime légal de l'association conjugale.

"Cette question fut amplement débattue au conseil d'Etat; le droit écrit et le droit coutumier s'y trouvaient représentés par les hommes les plus éminents. Chacun avait ses preédilections et ses défaveurs: il était difficile de s'accorder. Le droit romain était la loi la plus respectée dans les pays de droit écrit; on le mettait à un degré d'honneur et d'autorité bien au-dessus des simples coutumes. Or, le droit romain, se faconnant aux nécessités du mariage paien, avait adopté le régime dotal;

régime qui dominait dans les habitudes de l'Italie et des peuples romanisés. En dehors de la dot, les époux étaient séparés d'intérêt."

"37. Les provinces francaises régies par le droit écrit, ne connaissaient donc pas la communauté legalé. Là régnait le régime dotal dans toute sa hauteur; il s'y défendait par des considerations puissantes. Ce régime donne de grandes suretés à la femme, et augmente le pouvoir du mari. C'est le mari qui travaille, qui agit, qui soutient la fortune des conjoints: c'est lui qui doit profiter de ce labeur; son industrie ne doit enrichir que lui-même. C'est assez que l'épouse ait l'usage de cette heureuse abondance; elle ne contribue qu'à en régler l'usage: l'usage doit lui suffire. L'acquisition au profit due mari stimule sa vigilance et son industrie; l'usage des acquêts par la femme excite son économie. Mais la propriété des acquêts ne saurait lui appartenir. Si elle ne doit rien perdre, elle ne doit rien gagner. D'ailleurs, elle ne mérite pas de gagner, puisqu'elle na'a pas concouru par son travail à l'acquisition.'"

"Voilà donc quels sont les titres due régime dotal aux yeux de ses défenseurs. Supériorité de l'homme, infériorité de la femme, protection conservatrice donnée à sa faiblesse, toute la philosophie de ce régime est dans ces trois idées.

"38. Dans les pays coutumiers, c'était la communauté qui était le régime cher aux populations, et ce régime était si conforme aux usages et aux habitudes nationales, qu'il était le était le régime légal de ceux qui se mariaient sans conventions. – – 'Nos ancêtres,' dit Coquille [jurisconsulte, 1523-1603], 'ont introduit, par coutume, la communauté d'entre gens mariés en meubles et conquêts, et est vraisemblable que c'a été pour rendre les femmes plus soigneuses à conserver le bien de la maison, quand

elles savent y avoir part et profit, et afin que, comme leur esprit et leur corps son conjoints par union excellente, ainsi leurs biens soient en union.' J'aime ce langage, j'aime les idées qu'il exprime; cette philosophie de l'égalitè entre les époux me semble un grand progrès.

"39. Au moment ou un Code civil se préparait, la première question était de savoir si cette communauté légale, qui était attachée de plein droit à la célébration du mariage dans les pays coutumiers, devait être étendue aux pays de droit écrit, qui jusque-là-ne l'avaient pas connue, et qui, dans l'absence de contrat, laissaient les époux dans l'état de séparation de biens. Ce n'était donc pas entre le régime dotal et la communauté qu'il fallait opter; c'était entre la communauté et la séparation. Le régime dotal, ouvrage de la convention, était, en lui-même, hors de cause dans une question ou il ne s'agissait que de fixer l'état des parties qui n'avaient pas fait de convention.

"40. Réduite à ces termes, la lutte n'etait pas possible; la séparation est trop peu en harmonie avec les lois du mariage pour qu'on put l'ériger en droit commun. Le mariage est une société de deux personnes. Qu'y a-t-il donc de plus naturel que de soumettre au régime de la société, les biens dont elles sont propriétaires? Est-ce que la vie commune n'a pas pour conséquence la mise en commun de leur industrie, la confusion de tout le mobilier, la communauté des épargnes, comme des acquêts faits en commun? La séparation des biens, produit de ce relâchement des moeurs qui avait succédé dans Rome paienne a l'antique dépendance des femmes, la séparation des biens n'était adoptée, à défaut de contrat, dans les pays de droit écrit, que par un respect superstitieux pour le droit romain. La communauté est bien mieux assortie à la nature

du mariage: les époux, opèrent en commun, mêlent et confondent leurs meubles, leurs travaux, et pourvoient également a l'éducation et à l'établishment des enfants. C'est surtout dans la classe pauvre, qui ne fait pas ordinairement de contrat de mariage, que la communauté est appropriée à la situation des époux: dans cette classe, la femme travaille activement; par ses soins et ses travaux, elle contribue au bien-être commun, ou au soutien de la famille. Il convient donc de ne pas l'exclure des profits; il convient de l'intéresser au succès de l'union conjugale, et de l'admettre à y participer, à moins qu'il n'y ait d'autres conventions."

The following is our translation of the excerpts from Troplong, quoted above.

35. We now return to this idea, that community enters into the natural conditions of marriage; we inquire if the civil Code has done wisely in raising it to the legal regime of the conjugal relationship.

This question was fully debated in the council of state; the written law and the customary law were there represented by most eminent men. Each one had his preferences and his dislikes: it was difficult to come to agreement. The Roman law was the law most respected in the countries of written law; it was given a degree of honor and authority far above simple customs. Now the Roman law, basing itself upon the necessities of pagan marriage, had adopted the dotal regime; a regime which was dominant in the habitudes of Italy and the Romanized peoples. Outside of the dot the spouses were separate in interest.

37. The French provinces subject to the written law, were not familiar with the legal community. There the dotal regime was fully dominant. It was defended by powerful considerations. This regime gives great assur-

ances to the wife and augments the power of the husband. It is the husband who works, who acts, who sustains the fortune of the spouses: it is he who ought to profit from this labor; his industry should not enrich anybody but himself. It is enough that the wife has the usage of this fortunate abundance; she makes no contribution other than to control its use: the use should be sufficient for her. Acquisition to the profit of the husband stimulates his vigilance and his industry; the wife's right to use property acquired stimulates her economy. But the ownership of the acquests should not belong to her. If she ought not to lose anything, she ought not to gain anything, since she has not contributed by her labor to acquisition.

The above, then, are the merits of the dotal regime according to the views of its defenders. Superiority of man, inferiority of woman, a conserving protection given to her weakness, all the philosophy of this regime is in these three ideas.

38. This paragraph is quoted Note 32, *supra*.

39. At the moment when a Civil code was being prepared, the first question was to know if this legal community, which in the countries of the customs attached in full vigor at the celebration of the marriage, ought to be extended to the country of the written law which until that time had not known it, and which in the absence of contract, left the spouses in the state of separateness of goods. It was not then between the dotal regime and that of the community that it was necessary to choose; it was between community and separate. The dotal regime, a product of convention, had in itself nothing to do with the case where the only question was to fix the status of parties who had not entered into a convention.

40. Reduced to these terms, conflict was not possible; separation is too little in harmony with the laws of marriage to be established as of common right.

[The rest of paragraph 40 is translated page 51, *supra*, with the exception of one sentence there indicated by asterisks. This sentence reads as follows]:

The separation of goods, product of that loosening of morals which in pagan Rome was consequent upon the ancient dependence of women, was adopted, in default of contract, in the countries of the written law solely because of a superstitious respect for Roman law.

Following is the original of the excerpt from Sanchez Roman, Derecho Civil Español, 2nd ed., Volume V, page 547, quoted page 51, *supra:*

"* * * se conforma con la *unidad* del matrimonio, á la vez que con el derecho y libertad individual de cada conyuge; presupone el respeto á los fines y bienes particulares de éstos, y reconociendo á la nueva personalidad, que el matrimonio engendra, *fines* que le son *peculiares,* distintos de aquéllos, parte de esta idea para derivar lógicamente la de la necesidad de *medios* económicos, que le sean también *exclusivos,* y asigna una propiedad individual á la entidad matrimonial, diferente de la propiedad individual de los cónyuges, entregando el manejo de ese patrimonio comun á la direction unitaria, generalmente del marido, sin dejar por eso de arbitrar ciertas garantías para el condominio que la mujer ostenta en dicha común propiedad conyugal."